PREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 26 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1054

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Petitioner,

v.

HUDSON RAPID TUBES CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PORT AUTHORITY TRANS-HUDSON CORPORATION,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner Port Authority Trans-Hudson Corporation, a wholly-owned subsidiary of The Port of New York Authority, petitions for a writ of certiorari to review a final judgment of the Court of Appeals of the State of New York, which violates the express terms of a Congressionally-sanctioned interstate Compact between the States of New York and New Jersey.*

Opinions Below

The opinion of the New York Court of Appeals is reported at 20 N. Y. 2d 457. The majority opinion of Judge Keating and the dissenting opinion of Judge Burke are printed herein as Appendix A to this petition.

* On January 22, 1968 the State of New Jersey filed a motion for leave to file a complaint in an original action entitled *State of New Jersey* v. *State of New York and Hudson Rapid Tubes Corporation* (No. 34, Original) which also challenges the judgment of the New York Court of Appeals.

The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, is reported at 27 App. Div. 2d 32, 276 N. Y. S. 2d 283. The opinion of the Appellate Division, together with the two concurring opinions and two dissenting opinions of the Court, is printed herein as Appendix B.

The initial opinion of the trial court (Supreme Court of the State of New York, County of New York, at Special Term) is reported at 48 Misc. 2d 485, 265 N. Y. S. 2d 925, and is printed herein as Appendix C. A supplementary opinion of the trial court, overruling objections raised to the findings and conclusions contained in its initial opinion, is reported at 52 Misc. 2d 943, 277 N. Y. S. 2d 999, and is printed herein as Appendix D.*

Jurisdiction

The judgment of the New York Court of Appeals was entered on October 31, 1967.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

Question Presented

Did the New York Court of Appeals violate the Congressionally-sanctioned Compact between the States of New York and New Jersey authorizing The Port of New York Authority to condemn an interstate commuter railroad, concededly incapable of profitable operations, by basing the condemnation award on the value of the railroad to the public, rather than on the loss to the owner, thereby committing reversible error in that:

A. It failed to give effect to the express provision of the Compact which declared that in valuing

* A subsequent opinion of the trial court relating to interest on the awards is printed herein as Appendix E, but is not relevant to the instant petition for review.

this railroad, the court was not to award ". . . any increment above the just compensation required by the constitutions of the United States and of the state or states in which the property is located or has its situs by reason of any circumstances whatsoever" and, on the contrary conferred on the owner an unjustified windfall at the public's expense;

B. It failed to give effect to another express provision of the Compact which required it, in valuing the 65% of the railroad's property located in the State of New Jersey, to apply the valuation law of that State, which expressly prohibits condemnation awards in excess of the owner's economic loss; and

C. It failed to give effect to the manifest intent of the two states in executing the Compact that the then-existing well-settled rules of just compensation valuation under the Constitutions of the United States, New York and New Jersey be incorporated into their agreement.

Compact and Constitutional Provisions Involved

1. The following extracts from § 14 of the 1962 amendment to the Congressionally-sanctioned interstate Compact between New York and New Jersey relating to the condemnation of the Hudson Tubes railroad are involved.* The entire text of § 14 is printed herein as Appendix F.

". . . In any such [condemnation] action or proceeding the court or courts of the forum state shall apply the laws of valuation of the other state (hereinafter sometimes called the nonforum state) to the valuation of the property which is located or has its situs in the nonforum state . . ."

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* Ch. 209, Laws of N. Y., 1962, amending Ch. 154, Laws of N. Y., 1921; Ch. 8, Laws of N. J., 1962, amending Ch. 151, Laws of N. J., 1921.

This Compact received the consent of Congress pursuant to Article I, § 10, cl. 3 of the United States Constitution. Act of Aug. 23, 1921, Pub. Res. No. 67-17, ch. 77, 42 Stat. 174.

"The owner of any property acquired by condemnation or the exercise of the right of eminent domain for any of the purposes of this act shall not be awarded for such property any increment above the just compensation required by the constitutions of the United States and of the state or states in which the property is located or has its situs by reason of any circumstances whatsoever."

2. The following extract from § 17 of the 1962 amendment to the aforementioned Compact is involved. The entire text of § 17 is printed herein as Appendix G.

"This section and the preceding sections hereof constitute an agreement between the states of New New York and New Jersey supplementary to the compact between the two states dated April thirty, nineteen hundred twenty-one and amendatory thereof . . ."

3. The following constitutional provisions are involved:

United States Constitution, art. I, § 10, cl. 3: "No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another State. . . ."

United States Constitution, amendment V: ". . . nor shall private property be taken for public use, without just compensation."

United States Constitution, amendment XIV: ". . . nor shall any State deprive any person of life, liberty or property, without due process of law;"

New York Constitution, article I, § 7: "(a) Private property shall not be taken for public use without just compensation."

New Jersey Constitution, article I, ¶ 20: "Private property shall not be taken for public use without just compensation."

Statement

It may be helpful at the outset, before outlining the facts, to pinpoint the error of the court below which requires review here. In violation of the terms of a Congressionally-sanctioned interstate Compact, the New York Court of Appeals based its condemnation award for a 7.9 mile interstate commuter railroad upon the railroad's value to the public and not, as the Compact required, and the law has traditionally specified, upon the economic loss to the owner occasioned by the condemnation.

The Compact provision in question was designed to mean, and can only mean, that in valuing this interstate railroad the well-established rules of Federal, New York and New Jersey law must be applied. While acknowledging that the rule of decision in each of the three relevant jurisdictions "is that just compensation requires only that the condemnee be paid for what he has lost and not for what the taker has gained," (A. 5)* the Court of Appeals refused to follow what it thus recognized to be the law. It held that for the purpose of this case, and for this case alone, the owner must be paid not for his economic loss, but for the public gain resulting from the taking. Should it stand, the Court of Appeals' award would achieve the very result which the Compact provision was enacted to prevent. The Court's failure even to mention the relevant Compact provision in its opinion, or the obvious bi-state legislative intent behind it, serves only to accentuate the general lack of regard with which it viewed the very bi-state Compact which gave it its jurisdiction to hear the case.

The Court of Appeals, moreover, failed completely to follow the mandate of the Compact that it apply New Jersey law to that portion of the condemned railroad (65%) which is located in New Jersey. The court conceded that New Jersey law requires only that the condemnee be compensated for his economic loss, and not for what the public has gained, but nevertheless stated that this case "requires

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* References to the Appendix to this Petition are introduced in the text by the abbreviation "A.".

an approach different from that generally followed" (A. 6)—an approach which Judge Burke, in his dissent, characterized as violating the Compact by "create[ing] new and revolutionary law". (A. 22) Thereby the Court of Appeals raised what Judge Burke called "an important question of Federal law." (A. 23)

The following is a summary of the pertinent facts in the case:

The Port of New York Authority is a body, corporate and politic, created in 1921 pursuant to an interstate Compact between the States of New York and New Jersey.* This Compact received the consent of Congress pursuant to Article I, § 10, cl. 3 of the United States Constitution.**

It is the responsibility of The Port of New York Authority as the joint and common governmental agent of the States of New York and New Jersey to provide transportation, terminal and other facilities of commerce within a geographically-defined bi-state area identified as the Port of New York District in order to protect and to promote the commerce of the port in an orderly and effective manner. In carrying out this responsibility The Port of New York Authority operates the George Washington Bridge, the Holland and Lincoln Tunnels, three Staten Island bridges between the states, John F. Kennedy International, La Guardia and Newark Airports, bus and truck terminals, docks, piers and other port facilities within the New York-New Jersey port area.

During the years just prior to 1962 it became apparent to the legislatures of New York and New Jersey that one of the transportation facilities operating between said states was near financial collapse. The Hudson Tubes Railroad, the construction of which was commenced in 1874 and completed in 1911, had been providing interstate commuter service between the urban areas contiguous to the New York and New Jersey shores of the Hudson River for approximately 50 years. It was owned and operated by a

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* Ch. 154, Laws of N. Y., 1921; Ch. 151, Laws of N. J., 1921.

** Act of Aug. 23, 1921, Pub. Res. No. 67-17, ch. 77, 42 Stat. 174.

private corporation known as Hudson & Manhattan Railroad Company.*

By 1962, the year of condemnation, any profit potential to be found in the Hudson Tubes had long since vanished. Indeed, for the decade prior to condemnation the railroad was capable of producing only continuing and substantial deficits. (Tr. 4893)**

Its passenger traffic had declined from more than 112 million in 1929 to 29 million by the year 1962, a decrease of almost 75%. (PATH Ex. 258)

From the very outset of its operations in 1911 the railroad had been beset by financial troubles. It had not paid a dividend on its common stock since 1932, or on its preferred stock since 1933. It had not paid full interest on its junior indebtedness since 1934, or any interest whatsoever on its indebtedness since 1950. It had produced no net income since the year 1952 and, in the four years immediately preceding 1962, had incurred the following operating deficits, according to respondent's own figures:

1958 .....[$331,000]
1959 .....[$488,000]
1960 .....[$504,000]
1961 .....[$466,000] (PATH Ex. 299)

Aside from the large losses being incurred in its daily operations, the railroad was faced with capital replacement

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* By corporate change resulting from the termination of certain reorganization proceedings involving the railroad, which proceedings were pending between 1954 and 1961, the owner of the railroad at the beginning of 1962 was Hudson Rapid Tubes Corporation, respondent herein, a wholly-owned subsidiary of Hudson & Manhattan Corporation, successor in interest to Hudson & Manhattan Railroad Company.

** Citations to the printed transcript of the trial and post-trial hearings are prefaced by the abbreviation "Tr.". The printed portion of the Record On Appeal before the New York Court of Appeals is cited as "R.". References to the separate exhibit appendix are introduced in the text by the abbreviation "PATH".

requirements impossible of resolution so long as the railroad remained in private hands. (A. 2) As Justice Stevens noted in the Appellate Division, commenting on the railroad's condition at the time it entered bankruptcy: "The rolling stock was old, in some instances in a hazardous condition, most of the cars having been acquired between 1909 and 1911, the most recent being 20 cars acquired in 1928." (A. 29)

The railroad had been forced into reorganization under the bankruptcy laws in 1954 and had emerged from reorganization at the beginning of 1962 under a new corporate structure. The reorganization plan recommended by the Trustee, and adopted by the bankruptcy court, was premised on the conviction that the railroad was utterly insolvent. The result was that (a) all stockholder interests, both common and preferred, were wiped out; (b) unsecured creditors were paid in cash at the rate of 10 cents per dollar; and (c) the railroad operation was severed from the only income producing asset of the old railroad company, the twin 22-story office buildings that were constructed on top of the railroad's downtown Manhattan terminal.* The Office buildings were separated from the railroad in order to prevent the deficits of the latter from causing the financial demise of the former. Under the reorganization plan, the profitable real estate operations were to continue under a new entity, Hudson & Manhattan Corporation, while the unprofitable railroad operations, thus severed, were to be placed in a wholly-owned subsidiary, Hudson Rapid Tubes Corporation, respondent herein. (A. 2)

In the course of the reorganization proceeding the Securities and Exchange Commission rendered an advisory report to the bankruptcy court pursuant to Section 173, Ch. X of the Bankruptcy Act, recommending approval of the proposed reorganization plan as fair and feasible. In evaluating the report of the Trustee, the Commission noted:

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* The office buildings were also condemned in this proceeding, but the ultimate award for these buildings (approximately $18 million) is not an issue here.

> "The report concluded that the Debtor, as a private enterprise, could produce no foreseeable return to its present security holders; consequently, the only value would be the salvage resulting from liquidation, which is estimated as of December 31, 1959, at $2,573,800 for the railroad properties exclusive of the tunnels. In an earlier report on the liquidation value of the railroad assets, the engineers had arrived at a value of $525,000 for the tunnels on the basis of their use to carry telephone lines, resulting in a combined liquidation value of $3,098,800." *In the Matter of Hudson & Manhattan Railroad Co., Debtor,* 39 S. E. C. 852, 865.

The Commission's final conclusion was as follows:

> "Accordingly, we conclude that the assets to be acquired by the Railroad Company should be valued at not in excess of $3,500,000 estimated liquidation value for purposes of testing the feasibility and fairness of the plan. The engineers' value of $8,000,000, which includes an evaluation of the likelihood of a sale, is predicated upon many speculative factors and assumptions; it bears little weight upon our conclusion of value for purposes of this reorganization." *Id.* at 866.

The "engineers' value" referred to by the Commission was that submitted by Ford, Bacon & Davis,* one of the leading engineering and consulting firms in the country, during the course of the reorganization proceeding. That firm valued the railroad "as an operating enterprise" at $8 million (PATH Ex. 203). Only a few months later, the railroad had protested this $8 million valuation as excessive, claiming before the New York State Tax Commission that its properties had "no value on a going concern basis." (PATH Ex. 301).

The stockholders of the old railroad company appealed to the United States Court of Appeals for the Second Circuit from the district court's ruling that they were not entitled to participate in the newly-formed corporations. The Second Circuit affirmed the district court's decision,

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* Ford, Bacon & Davis ultimately acted as respondent's expert in the instant proceeding before the trial court.

sub nom. Spitzer v. *Stichman*, 278 F. 2d 402. In rejecting the stockholders' argument that the railroad possessed commercial value because of the likelihood that it might be condemned by a public agency for continued operation, the Second Circuit observed:

> "The only invariable principle of valuation in condemnation proceedings is that the award should reflect what the owner has lost; the criterion is not what the taker has gained. Roberts v. New York City, 1935, 295 U.S. 264, 282, 55 S.Ct. 689, 79 L.Ed. 1429. In the absence of a market value, this may properly be determined by what the property 'brings in the way of earnings to its owner.' Monongahela Navigation Co. v. United States, 1893, 148 U.S. 312, 328, 13 S.Ct. 622, 627, 37 L.Ed. 463. Where the property is incapable of producing earnings, 'junk value' may be appropriate." 278 F.2d 402, 410.

Respondent Hudson Rapid Tubes Corporation emerged from the bankruptcy proceedings with approximately $500,000 in cash. This amount was clearly insufficient for the railroad to continue in private operation for more than a brief period (A. 2). As respondent's President observed in the New York Supreme Court in July of 1962 at the beginning of the condemnation proceedings:

> "It is no longer possible for us, sir, to find the money with which to replace our signal system, and it is time that it was done. It is impossible, sir, for us to find the money to replace our power system which it is essential be done.
>
> "It is impossible, sir, in view of the competition—they have done a great job in bringing people over—but it is impossible for us to find the funds with which to replace our antiquated car equipment which in some cases is older than that of the city transit system. Some of it is forty or even fifty years old.
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> • • •
>
> "It is essential to the safety of the more than 100,000 passengers who ride the road each day between New York and New Jersey that something be done. We cannot do it. We have not got the funds.
>
> • • •

> "Now today we are safe, sir, but in view of the condition of our signal system, in view of the condition of our equipment, I can not tell you what might happen in the next ten days or thirty days. We are running as best we can." Official Transcript of Proceeding before Mr. Justice Quinn, July 24, 1962, pp. 43, 44, 45; read in part in evidence on the trial of this proceeding.

Faced with the imminent cessation of railroad operations in private ownership because of lack of funds, the legislatures of New York and New Jersey enacted concurrent legislation in 1962 directing the acquisition of the railroad and related properties by The Port of New York Authority, or a subsidiary thereof created for the purpose. The bi-state legislation thus required the Port Authority to take over the railroad to preserve its role as a commuter facility serving the Port of New York District.*

The 1962 statutes of New York and New Jersey were expressly declared to be supplementary to, and amendatory of, the 1921 Compact which created the Port Authority (A. 150). The constitutionality of the statutory agreement was upheld in *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority,* 375 U. S. 78, *rehearing denied,* 375 U. S. 960, *dismissing an appeal for want of a substantial federal question from* 12 N. Y. 2d 379, when attacked on the ground, *inter alia,* that further Congressional consent was required.

In enacting such legislation, the States were cognizant of the fact—amply substantiated by the uncontradicted evidence at the trial of this proceeding—that merely to keep the railroad operating safely in the future would require a multi-million dollar rehabilitation and modernization program and that, no matter what improvements were made, the railroad would continue to incur substantial operating deficits.

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* Petitioner herein, Port Authority Trans-Hudson Corporation ("PATH"), was created pursuant to this enabling legislation.

This condition of the railroad was recognized by the Interstate Commerce Commission in its granting of a Certificate of Public Convenience and Necessity to PATH on August 24, 1962.*

> "If the Port Authority, through the applicant [PATH], is willing to take over the operation of the line for the benefit of the metropolitan area population of New Jersey and New York, knowing that the operation will probably continue to incur deficits, it should be permitted to do so. In view of the present operating deficits, it is doubtful that the operation of the line could long continue otherwise." 317 I.C.C. at 361.

It was clear that a massive infusion of public capital was needed in order to restore the railroad to a reasonable condition. Governor Rockefeller in 1961 noted:

> "As a privately owned and operating business enterprise it is, and will continue to be, an economic failure. It is presently in the process of reorganization. It is extremely doubtful that the Hudson and Manhattan Railroad can continue to operate under present arrangements for more than two years.
>
> "Most of the rolling equipment of the Hudson and Manhattan Railroad is from 30 to 50 years old. It has been estimated that to restore the Hudson and Manhattan to reasonably modern and efficient operation, a capital investment of over 40 million dollars will be required." N. Y. Sess. Laws 2097 (McKinney 1961)**

The two states were therefore careful to specify in directing public take-over of this railroad that:

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* *Port Authority Trans-Hudson Corp.—Acquisition and Operation—Hudson Rapid Tubes Corp.*, 317 I.C.C. 357.

** Judge Keating noted in his majority opinion for the Court of Appeals: "The record reveals that much of the non-tunnel property was severely deteriorated, and that an expenditure of almost $32,000,000 would be necessary to rehabilitate the non-tunnel property. . . ." (A. 9).

> "The owner of any property acquired by condemnation or the exercise of the right of eminent domain for any of the purposes of this act shall not be awarded for such property any increment above the just compensation required by the constitutions of the United States and of the state or states in which the property is located or has its situs by reason of any circumstances whatsoever." (A. 148)

Since approximately 65% of the railroad's physical plant was located in New Jersey and the remainder in New York, the 1962 legislation provided that the courts of either of the States could, in a single condemnation proceeding, determine the total value of the properties condemned. The States agreed as well that "In any such action or proceeding the court or courts of the forum state shall apply the laws of valuation of the other state (hereinafter sometimes called the non-forum state) to the valuation of the property which is located or has its situs in the non-forum state." (A. 147-A. 148)

The legislation directed the Port Authority to determine in which State it was to institute the condemnation proceeding by estimating in which State "the greater part in value of all the property to be acquired" was located. (A. 147) Since the Port Authority was condemning not only the railroad, but also the two office buildings (owned by Hudson & Manhattan Corporation) which housed the principal terminal of the railroad, and since the office buildings had been producing net income of a capitalized value substantially in excess of the liquidation value of the railroad (A. 26), the Port Authority, through PATH, instituted condemnation proceedings in the New York State Supreme Court on June 28, 1962.

The decision by New York and New Jersey directing the Port Authority to condemn, acquire and operate the Hudson Tubes necessarily was based on a legislative judgment which balanced the necessity for keeping the railroad running against the ultimate cost to the public

for the preservation of such a commuter service. Such judgment, of course, was influenced by the various valuations of the railroad which had been a matter of public record throughout the bankruptcy proceedings prior to the 1962 condemnation. These valuations, as noted above, had ranged between $3.5 and $8 million, and served as indices for the states in making the difficult choice between abandoment and unavoidable costly operation of the railroad.

Valuation proceedings concerning both the buildings and the railroad were conducted in the New York State Supreme Court during late 1964 and early 1965, following the earlier litigation concerning the constitutionality of the enabling legislation prescribing the condemnation.

The decision of the lower court, rendered on December 10, 1965, awarded the sum of $55 million for the railroad.* The trial judge arrived at this figure by granting $30 million for the four railroad tunnels under the Hudson River (virtually the entire original cost of the tunnels, incurred at the turn of the century), $20 million for the remaining non-tunnel properties, and an additional 10% of the $50 million already awarded, or an additional $5 million, as going concern value. (A. 26)

Contrary to well-settled Federal, New York and New Jersey law, this award was based solely on the ground that the railroad was condemned for continued operation. Nowhere in its lengthy opinion did the trial court mention a single New Jersey decision, nor did it refer to the Compact provision requiring the award not to exceed the amount required by applicable constitutional standards. It ignored PATH's proof that the railroad's maximum pecuniary value to respondent was its value in liquidation. It likewise ignored PATH's evidence showing the security market's

* As indicated earlier, the trial court also awarded approximately $18 million for the buildings, but the latter award is no longer an issue in the case.

appraisal of the railroad's value as well as the "cash throw-off" value of the railroad to the respondent.

The award of original cost for the railroad tunnels completely disregarded their technological obsolescence. This obsolescence resulted mainly from their design which, "because of their size, and sharp curvature, has given them a handicap which will last as long as the tunnels last. It doesn't prevent their use under certain conditions, but it prevents the best possible use being made of them." (Tr. 4902).* As Justice Stevens noted when the Appellate Division later reduced the award to $3.5 million:

> "The construction utilized here, with particular reference to the tunnels, would not be used today. These tunnels are much smaller in diameter than other commercial tunnels since constructed in the area, and are not readily adaptable, if at all, to modern improvements to meet present-day needs in order to make the enterprise a profitable one." (A. 38)

And in the Court of Appeals Judge Burke, in his dissenting opinion, described the tunnels as "ancient" and "badly mended". (A. 13)

In its objections to the trial court's decree, PATH argued:

> "The awards violate the compact between the States of New York and New Jersey (Ch. 154, Laws of N. Y., 1921; Ch. 151, Laws of N. J., 1921), consented to by Congress (42 Stat. 174), under Article I, Section 10, Clause 3, of the Constitution of the United States, as said compact has been amended by Chapter 209, Laws of New York, 1962, and Chapter 8, Laws of New Jersey, 1962, in that, contrary to

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* Construction of the tunnels had been started in 1874 to accommodate streetcars and this resulted in tunnels smaller and containing sharper curves than modern tunnels. It has been recognized by all the New York courts which have considered the matter that neither the tunnels nor the railroad would be reproduced by anyone today. (A. 8-A. 9, A. 38, A. 119)

> the specific mandate set forth in Section 14 of the said 1962 legislation amending the compact, the awards exceed just compensation required by the Constitution of the United States as well as the just compensation required by the Constitution of New York for that portion of the condemned property located in New York and by the Constitution of New Jersey for that portion of the condemned property located in New Jersey." (R. 28).

In its subsequent opinion relating to PATH's objections, rendered on April 25, 1966, the trial court simply noted:

> "The objections of petitioner, Port Authority Trans-Hudson Corporation, to the Second and Last Separate and Partial Tentative Decree of the court filed February 2, 1966, in the above proceeding, with respect to *Damage Parcels 1 Through 53,* are overruled in their entirety." (A. 129)

On appeal to the Appellate Division of the New York State Supreme Court (New York's intermediate appellate court), the Court reduced the trial court's $55 million award to $3.5 million. Relying on traditional principles in the law of condemnation, the Appellate Division, two Justices dissenting, held that respondent was only entitled to an award representing the amount of its pecuniary loss occasioned by the condemnation. The Court, in reviewing the entire record, set this amount at $3.5 million.* (A. 46)

Respondent thereafter appealed to the New York Court of Appeals.** That Court, in an opinion by Judge Keating, acknowledged that ". . . the traditional rule which has evolved in condemnation cases . . . is that just compensation requires only that the condemnee be paid for what he has

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* In its brief to the Appellate Division petitioner argued that any amount awarded in excess of the owner's economic loss would violate the Compact. (PATH Br. 86-88).

** Petitioner also filed a limited cross-appeal which, however, is not relevant to or involved in the present petition.

lost and not for what the taker has gained." (A. 5)* Judge Keating, however, reasoned that since the railroad was "condemned for continued dedication to the same use to which the owner had dedicated the property" (A. 3), the Court did not have to abide by "the traditional rule". Declaring that this case was "*sui generis* and one which requires an approach different from that generally followed" (A. 11), the Court awarded $30 million for the railroad's tunnels alone—a reinstatement of the trial court's award on this point—and remanded the rest of the case to the lower court for further proof as to the value of the remaining railroad properties condemned, instructing the court however not to limit its award to liquidation value.** (A. 10)

As in the Appellate Division, so also in the Court of Appeals, petitioner argued that the Compact would be violated if any award in excess of the pecuniary or economic loss occasioned by the condemnation were to be granted. (PATH Br. 74-75). The majority opinion, however, did

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* While for the sake of simplicity, in light of the familiar terminology of the cases, we must discuss the applicable law in terms of contrast between "value to the taker" and "loss to the owner", such terms by themselves are grossly inadequate to describe the true nature of the property of which claimant was deprived in this case. Here, "value" to the taker was acquisition of an antiquated, financially debilitated railroad which required the expenditure of tens of millions of dollars and which would produce nothing but financial losses for the indefinite future. Here, "loss" to the owner was an eagerly sought opportunity to rid itself of a commercial property incurring mounting losses, which could not have continued in private operation for very long. These are the realities with which this case is concerned.

** In accordance with New York practice, upon remand to the trial court, that portion of the case involving the tunnel and subway properties was severed, and judgment was entered thereon for the respondent against the petitioner in the sum of $34,839,636.43, including interest. (A. 156-A. 158). Thus the judgment of the Court of Appeals clearly is final. *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120. *Cf., Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427. Execution upon this judgment has been stayed pending the action of this Court.

not expressly mention the point, although the dissenting opinion indicated that it must have been passed on.* (A. 22)

Judge Burke's dissenting opinion pointed out that the majority was disregarding well-established principles of condemnation law by "its new and radical theory" (A. 22). He concluded that such action on the Court's part violated in several respects the interstate Compact which authorized the condemnation, and thus presented "an important question of Federal Law". (A. 23)

REASONS FOR GRANTING THE WRIT

This Court should issue a writ of certiorari in the instant case because the integrity and future viability of interstate compacts are at stake. This is a case where the highest court of one of the compacting states has deliberately failed to apply the express terms of an interstate agreement in several respects. In addition, the case involves an important question of current National interest—the valuation of a railroad incapable of profitable operations.

Under similar circumstances, involving an interstate compact, this Court, as the supreme judicial arbiter of our Federal system, has recognized a duty to issue a writ of certiorari. Thus, in *Dyer* v. *Sims,* 341 U. S. 22, this Court granted a petition for certiorari sought by commissioners of an interstate agency on the ground that a decision of the highest court of a compacting state violated the Compact. This Court, in agreeing that the Compact had been violated and in rectifying its violation, asserted that the determination of "the nature and scope of obligations as between States" arising out of an interstate compact "is the func-

* Thereafter, petitioner, in accordanee with the usual procedure, moved to amend the remittitur to show that the court had passed on the Compact question and it was duly amended to show that PATH had properly raised and the court had rejected the federal question which is here in issue (A. 154-A. 155).

tion and *duty* of the Supreme Court of the Nation." 341 U. S. 22, 28 (emphasis added).

The current railroad crisis is well known to this Court. See this Court's recent decision in the *Penn-Central* merger case.* A three-judge District Court has been convened** to consider suits by creditors attacking the correctness of an order of the Interstate Commerce Commission which valued the assets of the New Haven Railroad for the purpose of its sale to the merged Penn-Central system on the basis of a liquidation value, which they also contended was too low. Creditor interests in the New Haven proceeding are complaining *inter alia* that the Interstate Commerce Commission did not follow the Court of Appeal's decision in this case.***

(a) The New York Court of Appeals Disregarded the Compact Provision Relating to the Valuation Criterion to be Applied

The 1962 agreement between the states clearly directed the court to apply the principles of just compensation as they had been established in prior judicial decisions, and to award only such amount for the properties condemned. The principle of just compensation, whether viewed under the Federal Constitution, or those of New York and New Jersey, has always been limited to indemnification of the condemnee's loss, with any gain to the condemnor being irrelevant. *Kimball Laundry Co.* v. *United States,* 338 U. S. 1; *Olson* v. *United States,* 292 U. S. 246; *Shoemaker* v. *United States,* 147 U. S. 282; *St. Agnes Cemetery* v. *State,* 3 N. Y. 2d 37 (1957); *Currie* v. *Waverly & N.Y.B.R. Co.,* 52 N. J. L. 381, 20 Atl. 56.

The decision of the Court of Appeals here is a complete evasion of that controlling principle. In awarding respond-

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* *Penn-Central and N. & W. Inclusion Cases,* 36 U.S.L.W. 4093 (decided January 15, 1968).

** *The Chase Manhattan Bank, N. A.* v. *United States of America and Interstate Commerce Commission,* S.D.N.Y., 68 Civ. No. 306.

*** *Id.,* Complaint, pp. 9-10.

ent substantially the original cost incurred in constructing its antiquated tunnel facilities at the turn of the century, the court ignored numerous precedents rightly declaring original cost to be a false standard in the determination of just compensation.* The court failed to discuss the only relevant and material issue, the actual economic loss incurred by the owner of the railroad as a result of the condemnation, and was seemingly overwhelmed by the sheer cost of the four functionally obsolescent tunnels under the Hudson River, much as one might be impressed and awed by the pyramids of Egypt.** The court failed, however, to relate such cost, however awesome, to the question of determining

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* *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U. S. 396, 403 ("Original cost is well termed the 'false standard of the past' where, as here, present market value in no way reflects that cost."); *Onondaga County Water Authority* v. *New York Water Service Corp.*, 285 App. Div. 655, 662 ("... 'original cost' and 'present value' are not equivalent terms."); *Kinter* v. *United States*, 156 F. 2d 5 (admission of cost of improvements held reversible error); *Bowie Lumber Co.* v. *United States*, 155 F. 2d 225 (exclusion of cost of 46-year-old building affirmed); *Devou* v. *Cincinnati*, 162 Fed. 633, *cert. denied*, 212 U. S. 577 (exclusion of cost of elaborate 40-year-old building in once-fashionable area which had greatly deteriorated affirmed); *Chicago* v. *Giedraitis*, 14 Ill. 2d 45, 150 N. E. 2d 577, 580 (exclusion of cost of improvements affirmed; evidence designed "only to show the appellant's investment . . . was therefore clearly inadmissible"); *Redevelopment Commission of Winston-Salem* v. *Hinkle*, 260 N. C. 423, 132 S. E. 2d 761 (exclusion of cost of property purchased ten years earlier affirmed because no evidence was introduced to show similarity of conditions at time of purchase and time of condemnation); *State Highway Commission* v. *Anderson*, 234 Ore. 328, 381 P. 2d 707 (admission of cost of improvements held reversible error). See *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123. See also 1 BONBRIGHT, VALUATION OF PROPERTY 429 (1937).

** Ford, Bacon & Davis had testified in the trial court that the reproduction cost of such tunnels, if one were to reproduce them today, would approximate a half billion dollars. Cross-examination of the witnesses as to whether such reproduction cost had any relevancy in determining the economic value of the railroad as a business enterprise was blocked by objections which the Appellate Division held should not have been sustained. (A. 32-A. 33).

the prior owner's economic loss. This the Compact required it to do by specifically directing that "just compensation", as determined by Federal and State constitutional standards, was to be the sole governing criterion.

The critical question, therefore, was and is: What are the parameters of the constitutional requirement of just compensation? Until this case, all courts, federal and state, were in accord with the pronouncements of this Court that the determinative question was: What was the owner's economic loss as a result of the taking?*

United States v. *Cors,* 337 U. S. 325, involved a statutory provision essentially similar to the one contained in the Compact.** In the *Cors* case this Court held that the statutory provision there in question was "coterminous" with the requirements of the Federal Constitution. 337 U. S. at 332. Mr. Justice Douglas pointed out that the basic principle embodied in both the statutory requirement and the cases construing the constitutional mandate of just compensation excludes "enhancement of value resulting from the government's special or extraordinary demand for the property". 337 U. S. at 333. He noted that "The special value to the condemnor . . . has long been excluded as an element from market value". *Ibid.* And further:

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* In Justice Holmes' classic formulation: ". . . the question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195.

** The pertinent statutory language involved in the *Cors* case, which involved Government requisition of a steam tugboat, was as follows:

> ". . . When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, *but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. . . .*" (Emphasis supplied.) Merchant Marine Act of 1936, § 902, 49 Stat. 2015, as amended, 53 Stat. 1255, 46 U. S. C. § 1242 (1939).

> "It is not fair that the government be required to pay the enhanced price which its demand alone has created. . . . the enhanced value reflects speculation as to what the government can be compelled to pay. That is a hold-up value, not a fair market value. That is a value which the government itself created and hence in fairness should not be required to pay." 337 U. S. at 333-334.

Just as this Court in *Cors* held that the statutory provision there involved was coterminous with existing decisional law on the subject, so the Compact provision here in question must also be interpreted in the light of settled law. And it is clear that such law prohibits the transformation of the public need for such a commuter facility into an unwarranted source of private gain to the former owner—gain which Mr. Justice Douglas aptly characterized as "hold-up value".* 337 U. S. at 334.

Directly in point is this Court's statement in *United States* v. *Miller*, 317 U. S. 369, 375:

> "Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker. Thus although the market value of the property is to be fixed with due consideration of all its available uses, its special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be

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* It is equally clear, as respondent argued to the Court of Appeals (in its memorandum opposing petitioner's motion to amend the remittitur), that the just compensation provisions of the Federal, New York and New Jersey Constitutions have always been considered to be identical in meaning. The highest courts of both States have cited this Court's decisions on questions of valuation interchangeably with their own. Under the decisions of this Court, as well as under the previous rulings of the New York and New Jersey courts, the law categorically forbids compensating the prior owner on the basis of the public need, rather than that of his own economic loss.

> excluded as an element of market value." (citations omitted).

In *Miller*, this Court had defined the constitutional requirement of just compensation to mean that:

> "The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." 317 U. S. at 373.

Similarly, in *Olson* v. *United States*, 292 U. S. 246, 255, this Court interpreted the constitutional standard to mean that a condemnee:

> "must be made whole but is not entitled to more."*

This "guiding principle of just compensation" was most recently restated by this Court in *United States* v. *Virginia Electric & Power Co.*, 365 U. S. 624, 633. This is the principle supported by all New York and New Jersey precedents on the point, which the Compact directed be applied in the present condemnation proceeding. The New York Court of Appeals, by ignoring such precedents in valuing the railroad, violated the Compact and committed error which requires correction.

The critical error in the Court of Appeals' opinion lies in its apparent inability to reconcile the fact of PATH's continued operation of the railroad with the fact that respondent's pecuniary loss as a result of condemnation is

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* The Court of Appeals' ruling is directly contrary to this Court's decision in *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 80 where it said:

> "That the property may have to the public a greater value than its fair market value affords no just criterion for estimating what the owner should receive."

And further:

> ". . . in a condemnation proceeding, the value of the property to the Government for its particular use is not a criterion." 229 U. S. at 80-81.

fairly represented by an amount equal to the liquidation value of the railroad. Liquidation value for an enterprise which the Appellate Division stated is "inherently incapable of profitable operation" (A. 45), however, has already been acknowledged as proper by this Court in *Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 9:

> "[T]he value of specially adapted plant and machinery exceeds its value as scrap only on the assumption that it is income-producing."

And Justice Cardozo stated in *Roberts* v. *City of New York*, 295 U. S. 264, 282:

> "Substantial prices are not paid for the privilege of conducting a business at a loss."

In directing that no more than "just compensation" be awarded to the former owners of the railroad, the States sought to avoid the precise result now wrought by the Court of Appeals' decision, the unjust enrichment of speculator interests at the expense of the public. This fact was noted by Judge Burke in his dissent, and also by Justice Steuer in his concurring opinion in the Appellate Division, where the award was reduced to $3.5 million. Judge Burke expressed dismay over the majority's "judicial solicitude for those financial interests, whoever they may be and wherever they may be located, that have seized upon this railroad as an object for speculation." (A. 23) Justice Steuer recognized the magnitude of the windfall speculators would receive if the trial court's award were undisturbed, pointing out that a windfall of over $34,000,000 would have been granted to the shareholders (A. 52).

The record demonstrates that the investing public valued all of the securities of this interurban railroad prior to the news of condemnation, after excluding the appraisal value of the buildings and miscellaneous property not condemned, in a range between $1 million (A. 43) and $3.8 mil-

lion (A. 39), thus confirming that all that the prior owners lost was a value equivalent to liquidation value.

This Court recently noted in *United States* v. *Rands*, 389 U. S. 121, 126 that:

> "... special values arising from access to a navigable stream are allocable to the public, and not to private interest. Otherwise the private owner would receive a windfall to which he is not entitled."

So, too, in the present case, the special value inherent in the public's acknowledged need for the continued operation of this railroad cannot be inflated into a multi-million dollar windfall for venturesome investors.

Nothing in the record indicates the owner's loss exceeded an amount between $3.5 million (as determined by the reorganization court, the Securities and Exchange Commission and the Appellate Division) and an outside figure of $8 million (based upon an optimistic opinion of Ford, Bacon & Davis (PATH Ex. 203), officially repudiated by the railroad three months later as excessive (PATH Ex. 301)), and any amount in excess thereof was constitutionally improper. The New York Supreme Court has now entered a judgment for $34,839,636.43 for the tunnels alone (A. 158), and, under the mandate of the Court of Appeals, it must determine how much more is to be awarded for the non-tunnel properties and going concern value, if any, after further consideration based upon the criteria laid down by the Court of Appeals.

(b) The Court of Appeals Disregarded the Compact Provisions by Ignoring the Controlling New Jersey Precedents

In authorizing the courts of one state (New York) to value that portion of the Hudson Tubes located in the other state (New Jersey), Section 14 of the 1962 legislation provides:

> "... In any such [condemnation] action or proceeding the court or courts of the forum state shall

> apply the laws of valuation of the other state (hereinafter sometimes called the nonforum state) to the value of the property which is located or has its situs in the nonforum state . . .'' (A. 147-A. 148)

Whatever might have been the power of the New York Court of Appeals to fashion an *ad hoc* principle of valuation for the New York portion of the railroad (absent the Compact and the restrictive legislation to which we have referred), it is clear that under the 1962 Compact legislation the New York courts were expressly required to apply New Jersey principles of valuation law in valuing the great bulk of the railroad which was physically located in New Jersey. This the Court of Appeals refused to do, even though it concluded;

> ''The Appellate Division correctly observed that the traditional rule which has evolved in condemnation cases is that just compensation requires that the property owner be awarded in cash an amount equivalent to the value which the property had in his hands—i.e., the sum of money which he could have realized in an uncoerced sale in the open market to a willing buyer. More precisely stated, the rule is that just compensation requires only that the condemnee be paid for what he has lost and not for what the taker has gained.'' (A. 5)

Solely because the railroad was condemned for continued operation in the public use, the Court of Appeals called this case ''*sui generis*'' and adopted an *ad hoc* rule of valuation, ostensibly for this case alone. Significantly, it reached this result without once mentioning the relevant Compact provisions, or New Jersey law, although the Court discussed in detail many Federal and New York cases. Only *after* it decided the issue did the Court allow that ''a brief discussion of New Jersey law is appropriate.'' (A. 10)

> ''The New Jersey law in this area is similar to the general rule which prevails in this and the federal jurisdiction. (*Currie* v. *Waverly, etc. R. R.*, 52 N. J. 387, 395, 20 A. 56, 58: *City of Trenton* v. *Lenzer*, 16 N. J. 465, 478, 109 A. 409, 416 cert. denied 348 U. S. 972).'' (A. 11)

This is the only discussion of New Jersey law found in the entire opinion, and the Court refused to follow the rule set forth in the cited New Jersey cases, saying:

> "For the reasons we have outlined, we regard this case as *sui generis* and one which requires an approach different from that generally followed." (A. 11)

Although the Court of Appeals acknowledged that "the rule which was applied by the Appellate Division is one of general acceptance," (A. 6), it, nevertheless, fashioned a new rule for this case in New Jersey (as well as in New York), ignoring the intent behind the Compact provision, closely analogous to the obligation of the Federal courts in diversity cases "to ascertain what the state law is, not what it ought to be." *Klaxon Co.* v. *Stentor Electric Mfg. Co. Inc.*, 313 U. S. 487, 497.

The dissenting opinion by Judge Burke clearly points up the Court's failure to abide by the language of the Compact:

> "The court in reaching today's decision pays lip service to the mandate it is under to determine the award for the New Jersey properties here in question under the requirements of the New Jersey and federal constitutions, but it is not an open question what the New Jersey and federal authorities hold. They expressly reject the notion that special or unique value to the taker alone, the basis upon which the majority's suggested award is founded, may be considered in determining just compensation." (A. 21)

Judge Burke noted that the leading New Jersey decision on this point speaks "in terms so unambiguous that one would not think its view could be disregarded". (A. 21) In *Currie* v. *Waverly & N. Y. B. R. Co.*, 52 N. J. L. 381, 20 Atl. 56, still the leading New Jersey authority on the question, the highest court of New Jersey had before it almost the precise question which faced the New York Court of Appeals in this case—whether the particular use which the condemnor was going to make of the property affected

its value in determining the just compensation to be awarded. The New Jersey court answered the question in the negative:

> "It is for the owner's deprivation of any existing value that he is to be compensated. Neither the individual advantages to the party acquiring the land, nor the necessity of its acquisition, can be considered in computing the loss of the land to the owner. . . ." 52 N. J. L. at 395-396, 20 Atl. at 58.*

But this is precisely what the New York Court of Appeals did in the present case—it valued the railroad solely on the basis of the alleged advantages accruing to the public condemnor—advantages which had no bearing whatever on the owner's economic loss occasioned by the taking.

(c) This Court Should Preserve The Integrity of Congressionally-Sanctioned Interstate Compact Provisions

In *Dyer* v. *Sims*, 341 U. S. 22, a case brought here by writ of certiorari, this Court said:

> "It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law'

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* As the present New Jersey Supreme Court recently stated in *State* v. *Burnett*, 24 N. J. 280, 288:

> "the constitutional requirement is satisfied by a sum of money which fairly represents the transferable value of the property in the market place."

In support of this statement, the New Jersey Supreme Court cited two decisions of this Court, *Olson* v. *United States*, 292 U. S. 246, and *Kimball Laundry Co.* v. *United States*, 338 U. S. 1, adopting their holdings as the law of New Jersey. See also *State Highway Comm'r* v. *National Fireproofing Corp.*, 127 N. J. L. 346, 351.

> governing interstate controversies . . . is the function and duty of the Supreme Court of the Nation." 341 U. S. 22, 28.

Delaware River Joint Toll Bridge Commission v. *Colburn*, 310 U. S. 419, is a case virtually identical to the present one. There, as here, an interstate agency, created by a bi-state Compact that had received the consent of Congress, sought a writ of certiorari to review an adverse decision by the highest court of one of the compacting states construing its Compact, and this Court granted the writ. In that case both the old New Jersey Supreme Court, as well as the Court of Errors and Appeals, had held that a Congressionally-sanctioned interstate Compact between New Jersey and Pennsylvania had obligated the Bridge Commission to pay property owners consequential damages caused by the construction of a highway approach to one of the Commission's bridges.

The New Jersey courts reached this result by construing a 1912 New Jersey statute (which was incorporated by reference into the 1934 compact creating the Bridge Commission) in the light of Pennsylvania law. The 1912 act was passed in *pari materia* with a similar Pennsylvania statute and the New Jersey courts, believing that the Pennsylvania constitution required payment for this kind of consequential injury, interpreted the New Jersey act in accordance with what they believed to be the requirements of Pennsylvania law.

This Court held that it had jurisdiction to review, by writ of certiorari, this decision by the highest court of a compacting State construing an interstate compact:

> ". . . we now conclude that the construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal 'title, right, privilege or immunity' which when 'specially set up or claimed' in a state court may be reviewed here on certiorari under § 237(b) of the Judicial Code, 28 U. S. C. § 344." 310 U. S. 419, 427.

Mr. Justice Stone's language is fully applicable here. First, as previously noted, *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority,* 375 U. S. 78, *rehearing denied,* 375 U. S. 960; *dismissing for want of a substantial Federal question an appeal from* 12 N. Y. 2d 379, holds that the interstate Compact here in question was "sanctioned by Congress".

Second, the Federal question raised by the interpretation of the Compact was "specially set up or claimed" in the New York State courts and therefore "may be reviewed here on certiorari". As previously noted, petitioner specifically pointed out to the trial court that its proposed award would violate the Compact's provisions (R. 28) and, in each of the New York appellate courts, including the Court of Appeals, petitioner pointed to the applicable Compact provisions and informed the court that any award for the railroad in excess of the prior owner's economic loss would violate the Compact. The Federal question which PATH now raises before this Court was, therefore, raised before the New York Courts. The amendment which the New York Court of Appeals made to its remittitur is conclusive on this point. Under these circumstances, this Court should grant the writ and construe and enforce the Compact, according to its express terms.

Here, as in *Colburn,* the highest court of a compacting State has construed an interstate Compact in such a manner as to impose on an interstate agency a cost for which the agency claims it is not liable under the terms of the Compact. As in *Colburn,* this Court alone is in a position to determine whether the courts of one State have properly determined the law of the other State in construing the Compact between the States.

The effective future use of interstate compacts requires that the courts enforce them according to their terms. Since the decision of this Court in the *Colburn* case in 1940 the use of the interstate compact as an effective means for joint state action has expanded greatly. The range of subject matter of these compacts is extremely impressive:

allocation and conservation of waters; flood control; water pollution control; management of fisheries; control of forest fires; harbor management; development of multi-state metropolitan areas; construction and operation of interstate parks; conservation of oil; regional development of higher education; modernization of parole and probationary procedures.*

It would seem clear, however, that, if the compact is to be a continuing effective device in the implementation of such joint activities, the courts of the compacting states must adhere to the express provisions of the compact when such are clearly applicable to judicial proceedings pending before those courts. As is evident from the instant case, where the highest court of one of the compacting states has ignored the language of the compact and entered a judgment affecting a bi-state agency, clearly contrary to its terms, this Court should provide the appropriate judicial review to rectify the situation.

(d) This Case Involves A Question of Current National Importance Requiring Consideration by this Court

The National importance of this litigation is illustrated by the fact that only two weeks after the New York Court of Appeals' decision, the Interstate Commerce Commission rendered an opinion valuing the New Haven Railroad in connection with its forthcoming acquisition by the merged Penn-Central system. The Commission found that like the Hudson Tubes, the New Haven is both essential and inherently incapable of profitable operations. The Interstate Commerce Commission found that "the total value of the New Haven sold [to an assumed public body] as a going concern is less than its liquidation value."** It therefore found

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* LEACH AND SUGG, JR., THE ADMINISTRATION OF INTERSTATE COMPACTS (1959).

** *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.*, I. C. C. Finance Docket No. 21989, pp. 20, 62.

that liquidation value would constitute "just and adequate compensation."*

The determination of the Interstate Commerce Commission is now being challenged before a three-judge Federal Court in actions brought by creditor interests of the New Haven Railroad against the United States of America and the Interstate Commerce Commission. An important contention in that litigation is that the Interstate Commerce Commission erred in not following the ruling of the New York Court of Appeals in this case. Thus, creditor interests are now contending on the basis of the Court of Appeals' decision that the Interstate Commerce Commission "erroneously gave no weight to the going concern value of the New Haven on the ground that its operations have been conducted for some years at a deficit."** The creditor interests have pointed with precision to the similarity between the situation of the New Haven Railroad and that of the Hudson Tubes. They noted that the New York Court of Appeals' decision:

> ". . . involved the Port Authority's acquisition by condemnation of the railroad properties of a corporation which were, and would continue to be, operated at a loss."***

They pointed out that because of the deficit nature of Hudson Tubes operations:

> ". . . the intermediate appellate court in New York had awarded only scrap value for the railroad properties and had rejected the corporation's claim for going concern value."****

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* *Ibid.*, p. 115.

** Complaint, *The Chase Manhattan Bank, N. A.* v. *United States of America and Interstate Commerce Commission*, S. D. N. Y., 68 Civ. No. 306, p. 9.

*** *Id.*, p. 10.

**** *Ibid.*

However, they emphasized that the Court of Appeals reversed and held:

> ". . . that the Port Authority should pay for the property depreciated original cost and not merely liquidation value and, since the property was acquired for operation, that there should also be an award for going concern value."*

Therefore, on the basis of the Court of Appeals' decision the creditor interests urge that the Interstate Commerce Commission erred in valuing the New Haven Railroad.

The correctness of the Interstate Commerce Commission's order valuing the New Haven Railroad will ultimately come before this Court for decision. Accordingly Judge Keating was incorrect when he said that the Hudson Tubes valuation problem is "sui generis". On the contrary, it involves an important National issue which has occurred in both the Hudson Tubes and New Haven suits and which most likely will reoccur again in the future.

* * *

We have earlier noted that this Court has pending before it a motion by the State of New Jersey for leave to file a complaint in an original suit against the State of New York and Hudson Rapid Tubes Corporation challenging the award which we seek here to have reviewed by writ of certiorari. We submit that the judgment of the Court of Appeals should be directly reviewed by a grant of this petition.

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* *Ibid.*

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 26, 1968

APPENDIX A

Opinions of the New York Court of Appeals

Opinion per Keating, J.

KEATING, J. The Hudson Rapid Tubes Corporation and the Hudson and Manhattan Corporation were the owners and operators of an interurban electric railroad system commonly known as the Hudson Tubes. The facility which has been in operation since 1911 carries some 28,000,000 passengers yearly and over 24% of the daily rush hour commuters between New York City and its New Jersey suburbs.

The Tubes have not, however, achieved the financial success which these figures might indicate. From its inception the Tubes encountered financial difficulty which continually plagued its operation. These difficulties, though initially due to the poor financial structure of the corporation as well as inefficient management, were compounded in recent years by a tremendous decline in the number of commuters as well as increasing labor costs.

The construction of bridges and tunnels opened the gates of New York City to millions of automobile and bus commuters who would otherwise use the Tubes. In addition, improved labor conditions since the 1930's served not only to increase the cost of operating the facility but also contributed to the passenger decline by reducing the work week from 6 to 5 days. All these factors combined accounted for a decline in passengers from 113,142,000 in 1927 to 28,000,000 in 1964.

Moreover, the ready availability of alternative forms of transportation via the tunnels and bridges limited the effectiveness of fare increases in coping with the desperate financial situation brought about by the loss in passenger service and increased labor and maintenance costs.

The situation was such that the corporation which had operated the Tubes was forced into reorganization under the Bankruptcy Act. In this reorganization, completed in 1961, all the shareholder interests, both common and preferred, were wiped out; unsecured creditors were paid in cash at the rate of 10 cents on the dollar and the railroad

operation was severed from the building structures in order to prevent the deficits of the former from causing the financial demise of the latter. Under the plan, the building properties were placed in a new entity, the Hudson and Manhattan Corporation, while the railroad operations were to be conducted by a wholly owned subsidiary, the Hudson Rapid Tubes Corporation. The latter was provided with approximately $500,000 in cash, an amount woefully inadequate to meet the long-neglected maintenance needs of the corporation.

Yet, despite its poor financial condition, the Tubes remained an essential public facility, without which the remaining interstate facilities were incapable of transporting the thousands of persons who commuted daily between New York City and New Jersey.

Given the essentiality of this facility and, faced not only with the bleak past but with the dim financial future of the Tubes, the Legislatures of both the States of New York and New Jersey determined that the continued operation of the facility could only be continued under public ownership. Therefore, pursuant to bi-State legislation (L. 1962, ch. 209; N. J. L. 1962, ch. 8), the petitioner, Port Authority Trans-Hudson Corporation (PATH), a wholly owned subsidiary of the Port of New York Authority, condemned the property of both the Hudson and Manhattan Corporation and the Hudson Rapid Tubes Corporation.

The Supreme Court (Special Term) made an award of $55,000,000 to the Hudson Rapid Tubes Corporation for its railway property and an award of $17,996,000 to the Hudson and Manhattan Corporation for its buildings. Interest on the Hudson Rapid Tubes award was granted at the rate of 4% per annum on that portion of the property situated in New York State and at the rate of 6% on the physical assets situated in New Jersey. By stipulation, the railway properties were allocated 65% to New Jersey and 35% to New York. Interest on the award to the Hudson and Manhattan Corporation for its real property was also limited to 4%.

The Appellate Division, two Justices dissenting, modified the award to Hudson Rapid Tubes from $55,000,000 to $3,500,000. The basis of the Appellate Division's ruling was that, because of the poor financial condition of the corporation, there would be no prospective commercial purchasers available on the open market and, therefore, under traditional rules, the only value which the property had to its owners was liquidation or scrap value. The Appellate Division also reduced the rate of interest on the properties situated in New Jersey from 6% to 4%.

The claimant-appellant, Hudson Rapid Tubes Corporation, appeals from the Appellate Division order, alleging that the court erred in predicating its award on salvage or scrap value. It asks us to increase the award to $127,000,000. In addition, it asks reinstatement of Special Term's interest award of 6% on the New Jersey property and, along with its parent, Hudson and Manhattan Corporation, it asks us to strike down as unconstitutional New York's statutory award of 4% interest as it applies to the New York property for the period after January 1, 1966.[1]

The condemnor, Port Authority Trans-Hudson Corporation, also appeals from so much of the order of the Appellate Division as included in its award $500,000 cash which was not appropriated.

The first and most important issue which must be decided on this appeal is the question of what constitutes just compensation to the owner and operator of an essential public facility when its property is condemned for continued dedication to the same use to which the owner had dedicated the property. It is essential to the resolution of this question to consider first what was actually taken. Special Term divided the property into two classes, the tunnel property and the non-tunnel property.

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[1] This is the only portion of the order of the Appellate Division from which the Hudson and Manhattan Corporation appeals.

The tunnel property upon which it placed an evaluation of $30,000,000 included:

(a) Four single-track railway tunnels under the Hudson River, two 6,600 feet long and the other two 6,000 in length—making a total of 25,200 feet, or about 4¾ miles of subaqueous tunnels.

(b) Subterranean tunnels or subways, which connect the river tunnels to the railway's terminals—at Church Street and at 33rd Street in Manhattan and at Hoboken and Jersey City—including nine stations which are integral parts of these subway tunnels. The entire railway system measures, as double track, 7.9 miles in length, of which the subterranean tunnels or subways are about 5.4 miles in length.

For this property, which would cost in excess of $400,000,000 to reproduce and would require an expenditure of only $88,000 to put in perfect working order, the Appellate Division awarded virtually nothing, since the property would in liquidation bring at most a nominal sum, if that.[2]

The non-tunnel property, for which Special Term awarded $20,000,000 plus an additional increment of $5,000,000 for going concern value, included:

(a) Generally speaking, all the non-tunnel properties, including 223 passenger cars;

(b) the signal system, track and roadbed;

(c) electrical transmission, distribution system, communication system and compressed air system;

(d) structures, including repair shops, electrical substations and surface passenger stations;

(e) emergency fans and blowers, tunnel drainage and sewage ejection systems; and

(f) shop equipment, tools, change booths, turnstiles, etc.

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[2] Indeed, it appears that upon liquidation it would cost at least $100,000 to plug up the tunnels.

For this non-tunnel property, the Appellate Division awarded approximately $3,000,000. Of this, $1,700,000 covered the cost of recently purchased railroad cars and $1,300,000 the remainder. The Appellate Division also held that, because of the unprofitability of the business enterprise, no separate award for going concern value was justified.

We hold that the Appellate Division erred in its disposition, that its decision, particularly as it relates to the tunnel property, reaches a harsh and unjust result and is neither compelled nor warranted by precedent.

The Appellate Division correctly observed that the traditional rule which has evolved in condemnation cases is that just compensation requires that the property owner be awarded in cash an amount equivalent to the value which the property had in his hands—i.e., the sum of money which he could have realized in an uncoerced sale in the open market to a willing buyer. More precisely stated, the rule is that just compensation requires only that the condemnee be paid for what he has lost and not for what the taker has gained.

A problem like this, however, cannot be dealt with dogmatically. One commentator has described "value to the taker" as being "One of the most confusing aspects of the theory of valuation under the law of eminent domain" (1 Orgel, Valuation Under Eminent Domain [2d ed., 1953], p. 351). The decisions are not always helpful. The oft-cited opinions of Mr. Justice Holmes in *City of New York* v. *Sage* (239 U. S. 57) and *McGovern* v. *City of New York* (229 U. S. 363) both dealt with the claim of a farmer whose property was taken, along with many other parcels, to establish a reservoir site. The court correctly rejected the owner's claim that he be compensated on the basis of reservoir values, since the reservoir was created by the assemblage made possible solely by the condemnation itself.

The present case is in sharp contrast. We are here concerned with a property which has a usefulness created by

the owner himself through the expenditure of large sums of money and by the continued operation of the property for the very purpose for which the petitioner is acquiring the property. It is the owner who built the "reservoir"—the Tube railway system in the present case. This owner has developed its property at a cost of millions of dollars and operated it for more than 50 years. It is admittedly of great usefulness in the daily transportation of thousands of commuters. A condemnor should not be permitted to tell him: "It's only worth scrap or less".

While the rule which was applied by the Appellate Division is one of general acceptance (1 Orgel, Valuation Under Eminent Domain, *supra,* p. 353) and achieves a reasonable and just result in most cases, neither this court nor the Supreme Court of the United States has ever attempted "to prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all cases. Fair market value has normally been accepted as a just standard. But when the market value has been too difficult to find, or *when its application would result in manifest injustice to the owner or public,* courts have fashioned and applied other standards." (*United States* v. *Commodities Corp.,* 339 U. S. 121, 123 [emphasis added]; *United States* v. *Virginia Elec. Co.,* 365 U. S. 624.)

Thus, in *Matter of City of New York* (265 N. Y. 170), involving the condemnation of an elevated railroad spur for the purpose of destruction, we sustained an award for the easements of light and air for which the condemnee was required to pay when it constructed the elevated railroad. Although the railroad facility in question was losing money and the easements had no value to the railroad upon the cessation of operations, we upheld an award predicated upon original cost. Chief Judge Pound, speaking for the court, wrote (p. 181): "The contention of the city, that the railroads are entitled to no compensation, is based on the argument that these rights were of no use to the rail-

roads except as they were compelled to acquire them to operate and of no value except to a going concern, has some logical force, but such rights were obtained in order to permit the roads to exercise their franchise in the street in perpetuity, and when the city terminated such rights it should fairly compensate the roads for the loss of such rights."

It is true that we sustained in that case an award of scrap value for the actual structures. Unlike the case at bar, however, the structures were useless and were being condemned for destruction. Likewise, no award was allowed for the franchise which the corporation received without cost from the State, albeit they were required to expend large sums of money to acquire the easements. The court quite properly felt that the reimbursement for the cost of these easements was sufficient under the circumstances.

We note that the Supreme Court in affirming our decision as to the value of the structure wrote: "The structure was appraised as junk, the city having undertaken to bear the cost of removal. *Such an appraisal might be too low were it not for the award for the private easements.* To realize the value of those easements, an abandonment of the spur was necessary. 'The railroads could not release their rights to the abutting owners and continue to operate their railroads in the street.' * * * The structure in the circumstances had no value except as scrap." (*Roberts* v. *City of New York,* 295 U. S. 264, 284, per CARDOZO, J. [emphasis added].)

Most recently in *Matter of City of New York* (*Fifth Ave. Coach Lines*) (18 N Y 2d 212, 225) we likewise departed from the general rule where to do otherwise would have, in the words of the Supreme Court, resulted in "manifest injustice to the owner" of the property. In that case both lower courts and this court awarded amounts far in excess of what could have been realized on the open

market because of the financial condition of the condemnee. We felt it would not conform to traditional standards of equity and justice to permit the city to break the company financially and then pick up the pieces at a highly depreciated rate.[3]

We are well aware of the distinction between this case and cases we have just cited and discussed. Nevertheless, the common thread which runs through all of them is that just compensation requires a result which is "'just' both to an owner whose property is taken and to the public that must pay the bill". (*United States* v. *Commodities Corp.*, 339 U. S. 121, 123, *supra.*)

Can it be said by any objective standard that an award of scrap value—*nothing*—is fair and just for the tunnel property, an essential part of an essential public facility, which cost some $32,000,000 to construct, which would cost in excess of $400,000,000 to reproduce and which, with some minor expenditures, will function as good as new for an indefinite period? We think not. As the Supreme Court noted in another context: "It involves a practical contradiction of terms to say that property useful and actually used in a public service is not to be estimated as having the value of property in use, but is to be reckoned with on the basis of its 'junk value.'" (*Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 191 [1918].)

On the other hand, we cannot ignore the factors which militate against a recovery of the kind suggested by the condemnee. We cannot ignore the unprofitability of the corporation. That is a very significant factor. We cannot ignore the reasons for this unprofitability. Nor can we ignore the fact that, while these tunnels are adequate to meet the needs of the condemnor for an indefinite period

[3] We had reached this conclusion despite the fact that the condemnee had never in fact complained about the validity of the rates and without any finding that they were constitutionally invalid.

of time, their construction and design left something to be desired 50 years ago and that, if a new facility were being constructed, it would be structured in such a manner as to insure adaptability to the modern means of transportation which are likely to be developed as we progress into the 21st century.

Considering all these factors, we believe, that the award of $30,000,000 made by Special Term and predicated on the conclusion that the condemnees should at least be repaid for the depreciated original cost of the tunnels is fair and just and that an award either considerably above or below that figure would be "manifestly unjust" to the owner whose property is taken and the people who must pay the bill.

As to the non-tunnel property we believe, for the same reasons outlined above, that the Appellate Division erred in awarding scrap value solely on the basis of unprofitability of the enterprise. On the other hand, the award of $20,000,000, allowed by Special Term, on the basis of original cost less an amount for depreciation which had no support in the record, is arbitrary and cannot be sustained.

The record reveals that much of the non-tunnel property was severely deteriorated, and that an expenditure of almost $32,000,000 would be necessary to rehabilitate the non-tunnel property whereas only $88,000 was all that would be required to restore the tunnels. In addition, the record indicates that, despite rising costs of labor and equipment, the original cost of the non-tunnel property exceeded the depreciated reproduction cost of that property and the award made by Special Term was only some $3,000,000 less than the depreciated reproduction cost. By comparison, the award for the tunnel property, which gave effect to the unprofitability factor, was less than one fifteenth the depreciated reproduction cost. It is thus clear that Special Term not only failed to give effect to the physical and technological obsolescence of the property but that it also apparently

ignored the enormous expenditure which was required to rehabilitate the property and did not give any significant effect to the unprofitability factor.

We believe that this portion of the case must be remanded to Special Term for a determination of just compensation based upon all the factors which we have outlined.

Similarly, we believe that Special Term erred in awarding $5,000,000 for going concern value by taking 10% of the total award for tangible property. While there is evidence that such a value exists in this case, there is no proof in the record to sustain Special Term's finding that the claimant is entitled to an award of an additional 10% of the values fixed for the tunnel and non-tunnel properties. There is no basis or warrant in law for any such rule of thumb. A finding of going concern value must be based upon evidence paralleling what we held would have to be shown in the *Fifth Ave. Coach* case (18 N Y 2d 212, 221-222, *supra*), that is, the cost of organizing and systematizing the enterprise, such as the cost of developing operating schedules, operating records, systems of procedure and the training of personnel.[4] To the extent that unprofitability is evidence of inefficient organization that factor must be considered in determining the award.

Before going on to discuss the remaining points, a brief discussion of New Jersey law is appropriate. Under the bi-State legislation authorizing the condemnation of property by the Port of New York Authority (L. 1961, ch. 312,

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[4] The argument forcefully advanced in the dissenting opinion is that "[e]conomic viability, i.e., the capacity to operate at a profit, is, as the *Fifth Ave.* opinion makes clear, the *sine qua non* for an award of going concern value." The only opinion in the *Fifth Ave.* case which clearly outlines that position is the dissenting opinion. Judge BURKE, speaking for the majority, wrote: "The argument made by the respondent [condemnor] that going concern value should not be allowed where the court found an inadequate plant, dwindling profits and poor future prospects was made long ago and rejected." (18 N Y 2d 212, 223.)

§ 14; N. J. Stat. Ann., § 32:1—35.63) we are required to apply New Jersey law to that portion of the property located in New Jersey. The New Jersey law in this area is similar to the general rule which prevails in this and the Federal jurisdiction. (*Currie* v. *Waverly & N. Y. Bay R. R. Co.*, 52 N. J. L. 381, 395; *City of Trenton* v. *Lenzner*, 16 N. J. 465, 478, cert. den. 348 U. S. 972.) For the reasons we have outlined, we regard this case as *sui generis* and one which requires an approach different from that generally followed. Indeed, the few cases in other jurisdictions which are similar to the one at bar have also departed from the general rule (See 2 Orgel, Valuation Under Eminent Domain [2d ed.], § 217).

We of course cannot state with certainty what approach our brethren on the New Jersey Supreme Court would take to this problem. Perhaps they would award less—perhaps more. We must, however, decide the case and we believe that, because of the manifest injustice of awarding scrap value, it is not unreasonable to assume that the view we have taken would be adopted by that court.

We turn now to the award of interest. The contention made by both condemnees regarding the unconstitutionality of the New York statute limiting the award of interest to 4% was made and rejected in *Matter of City of New York* (*Fifth Ave. Coach Lines*) (*supra*, cert. den. on this particular issue 386 U. S. 778). No substantial reason has been suggested requiring a different result in the case at bar.

We agree, however, with the Hudson Rapid Tubes' contention that the Appellate Division erred in reducing the interest award on the New Jersey property from 6% to 4%. The argument advanced by the condemnor is that New Jersey has no statute regarding the payment of a specific rate and that the New Jersey courts, in considering the rate of interest to be awarded, would give some weight to the fact that the condemnee's enterprise was operating at a loss and would, therefore, award only 4% interest

instead of the usual 6%. This argument, however, overlooks the fact that the condemnee is entitled to the principal award for the taking of its property from date of the taking and that the award of interest compensates for the failure to make such payment. It is most inequitable and, indeed, unconstitutional, we believe, to penalize the condemnee for the delay which has resulted in the most part from the litigation which it has engaged in to protect its own rights. Moreover, the unprofitability aspect has already been taken into consideration in determining the initial award. To consider that fact again in determining the rate of interest is unfair and is not permitted or sanctioned either by the Constitution of the United States or New Jersey law. (*United States* v. *Klamath Indians*, 304 U. S. 119, 123; *State* v. *Seaway*, 46 N. J. 376, 380.)

The award of 6% is fair and proper under New Jersey law (*Cohrs* v. *Igoe Bros.*, 71 N. J. Super. 435, 448) and the Appellate Division's determination in this regard should be rejected and Special Term's accepted.

To summarize:

On appeal by the claimant Hudson Rapid Tubes Corporation, the order of the Appellate Division should be modified, with costs in this court and in the Appellate Division to the claimant, to the extent of (1) reinstating so much of the decree of Special Term as awarded $30,000,000 for the subway and tunnel properties and as fixed the rate of interest applicable to the award for the New Jersey properties, and (2) remanding to Special Term for further consideration, in accordance with the opinion herein, questions relating to the determination of value for the remaining properties and going concern value and, as so modified, affirmed.

On the appeal by the claimant Hudson and Manhattan Corporation, the order of the Appellate Division should be affirmed, without costs.

Dissenting opinion per Burke, J.

BURKE, J. (dissenting). "[I]t is axiomatic that the measure of compensation for property taken is the owner's loss and not the taker's gain (*Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195; *Kimball Laundry Co.* v. *United States,* 338 U. S. 1, 5; *McGovern* v. *New York,* 229 U. S. 363). In its application to this case, this simply means that we must look to the value of what the condemnees have lost and not to what the condemnor has gained." (*Matter of City of New York* [*Fifth Ave. Coach Lines*], 18 N Y 2d 212, dissenting opn., p. 224; see, also, *St. Agnes Cemetery* v. *State of New York,* 3 N Y 2d 37, 41.) There was no disagreement on this court in the recent *Fifth Ave.* case on this point; our only difference concerned the amount of the loss resulting to the condemnee because of that taking. The fundamental premise upon which our holding there was based, as well as that upon which the dissent was grounded, was that the economic loss of the owner was determinative of the amount of compensation to which it was entitled under the Constitution of this State and the Federal Constitution. The very same rule is articulated by the New Jersey authorities as to the requirements of the Constitution of that State. (See, e.g., *Currie* v. *Waverly & N. Y. Bay R. R. Co.,* 52 N. J. L. 381 [Ct. Err. & App., 1890]; *City of Trenton* v. *Lenzner,* 16 N. J. 465 [1954], cert. den. 348 U. S. 972 [1955]; *Yara Eng. Corp.* v. *Newark,* 136 N. J. Eq. 453 [1945].)

Today, however, we are told that the claimant owner of a decrepit, financially hopeless transportation system, tailored to the measurements of an ancient, badly mended tunnel[1] is entitled, by reason of the decision of the public

[1] In the course of its construction, the original tunnel "blew out" and was flooded, requiring the installation of a reinforced concrete lining which reduced the bore of the tunnel to 15 feet 3 inches. This set the standard for the balance of the system, requiring utilization of cars of a size unsuitable to a modern transit system. Additionally, the line has sharp curves and steep grades necessitating reduced operating speeds for its trains. In 1910 the chief engineer for the road told the Institute of Civil Engineers of Great Britain that the road had been planned with single unit trolleys in mind, not multiple unit trains.

authorities to take over its operations, rehabilitate it at a cost of about 80 million dollars, and assume its losses, to a special dispensation from this basic rule. We are told that, to avoid "injustice," the property, since it is to be put by the public authorities to the very same use to which it was formerly devoted, must be valued at its *original cost* less some amount representing the cost which the public will have to pay to put it in condition to operate safely and efficiently.

In my view "justice" demands nothing of the sort. There is neither authority nor reason for such an award. It is unreasonable and unfair to the Port Authority, and, therefore, denies this bi-State agency the due process to which it is entitled in our courts, and it may well be in violation of the interstate compact under which the Legislatures of New York and New Jersey provided that the Port of New York Authority should take over and operate this commuter railroad.

It is abundantly clear, I feel, that the majority is troubled by the great disparity between this railroad's commercial value as scrap and its value, as the majority views it, to the public as an operating, though unprofitable, publicly financed transit facility. The court has not, however, translated this visceral feeling of discontent with the application of traditional rules of valuation to the case at bar into a rational alternative formula for determining just compensation.

The majority is correct in asserting that determination of the just compensation to which one whose property has been taken under the power of eminent domain is entitled is, as the cases reveal, not subject to "rigid rules". Notions of "fairness" and "equity" under all the circumstances of the case are involved. (*United States* v. *Commodities Corp.*, 339 U. S. 121, 124, cited in *United States* v. *Virginia Elec. Co.*, 365 U. S. 624.) "Fairness" and "equity", however, are terms with content, albeit often difficult of exact determination. They are not mere alibis upon the basis of which emotion unreined by reason may roam unchecked.

The demands of fairness are fully met when, as Mr. Justice ROBERTS observed in *United States* v. *Miller* (317 U. S. 369, 373), the owner of taken property "is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." Likewise, "It is not *fair* that the government be required to pay [an] enhanced price which its demand alone has created." (*United States* v. *Cors*, 337 U. S. 325, 333; italics supplied.) The taker too is entitled to fairness. To compel it to pay an award which "does not fairly represent the fair market value is effectively a confiscation of public property." (*Matter of City of New York* [*Friedman*], 24 A D 2d 243, 246.)

What, then, we may ask ourselves, have the owners of this railroad lost through its taking? Where would they be, what would their investment be worth, absent this taking? The answer is very simple. Absent this taking, the Hudson Rapid Tubes Corporation would still be the owner of a dismally unprofitable railroad, whose highest commercial value was as scrap. This is not disputed. The opinion for the majority sufficiently describes the road's bleak history and its barren future.[2] No private purchaser would think of taking it over for purposes of continuing its operations. Commercially, its liquidation value was all the owners could hope to realize. I cannot see how "fairness" and "justice" require that the public, here this bi-State agency, its bondholders and the millions of persons it serves, should have to pay the owners any more than this amount for their property. Mr. Justice CARDOZO's comment is perfectly apt: "Substantial prices are not paid for the priv-

[2] For instance, in the face of a 50% increase in the population of Northern New Jersey between 1930 and 1960, this railroad's traffic declined 70%. From the date of this taking, 1962, to 1964, it declined 10%. Its operating losses were staggering, and, if it were not taken over when it was, continued operation would have served only to lessen (probably eliminate) the value of the owners' equity in the enterprise. This decline continued into 1965 (an additional 6%).

ilege of conducting a business at a loss." (*Roberts* v. *City of New York*, 295 U. S. 264, 282.)

The majority, in order to justify an award higher than scrap value, has stressed the fact that these railroad properties are (and presumably need) to be continued in use by the condemning agency and that they would cost hundreds of millions of dollars to reproduce.[3] Such considerations are, however, irrelevant to determination of the question at hand. These properties have, it is clear, value to the taker, only in the sense that they are specially adaptable to a continually diminishing public need, at a huge cost, but it is equally clear that such gain to the taker is wholly unrelated to any deprivation imposed upon the owner and must, for that reason, be rejected as a measure of the public's obligation to pay. (*Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 5.) Value to the taker can be allowed as a basis for an award here only if we are to allow the owner to take advantage of the political necessities of the condemning party. But "[i]t is just this advantage that a taking by eminent domain excludes." (*McGovern* v. *City of New York*, 229 U. S. 363, 371-372; see, also, *United States* v. *Twin City Power Co.*, 350 U. S. 222, 228, citing *United States* v. *Miller*, *supra*, p. 375; *United States* v. *Cors*, *supra*.)

Analogous to this present situation was the situation involved in *United States* v. *Twin City Power Co.* (*supra*). There, as here, the property acquired had conceded *physical* utility for the purposes of the acquisition whether in the hands of the condemnor or the condemnee. The condemnee, a power utility, had previously assembled the lands for the very purpose to which the Government intended to devote the land. The utility began its acquisition in 1901. By

[3] The majority recognizes, as did the six Justices below, that these allegedly essential facilities (whose absolute essentiality is open to considerable doubt in light of the severe and continuing passenger decline) would not be reproduced exactly. The "substitute facility" might well be additional automotive tubes and buses, all of which have proven profitable.

1911, it owned practically all the land *necessary* for an integrated site for a hydroelectric power project. The Twin City land (4,700 acres) was not only available but essential for such project.

The position taken by the condemnee in *Twin City* had in many respects a more valid basis in terms of "justice" and "equity" than that of the present claimant, but there in rejecting the power company's claim based on the special availability of the lands for the purposes of the Government (i.e., for power-site purposes) the Supreme Court held that it had such value only in the hands of the Government since the latter possessed the dominant servitude in the flow of the stream, without which the land had no value as a power site. Since the owner did not possess the power potential in the stream, it could claim no power potential in the land. By the same token the property in the case at bar has utility only in the hands of the petitioner which has the financial capacity to engage in a deficit operation, whereas it is conceded that no private investors can be found who would undertake such an operation. To paraphrase *Twin City,* only a governmental entity, such as the petitioner, has possession of the cash flow, without which the property involved herein has no value for railway purposes. Since neither the claimant nor other private persons possess such cash flow which they would willingly devote to such purpose they can claim no railway value in the property.

The majority's citation of *Denver* v. *Denver Union Water Co.* (246 U. S. 178), a *rate making* case, as support for the proposition that in a proceeding in eminent domain a commercially valueless enterprise must be valued above scrap, simply because the condemnor has elected to continue the business at a loss, is inapposite. The majority concedes that the remark it quotes was uttered in "another context", and that context bears examination. In *Denver* v. *Denver Union Water Co.,* the Supreme Court was dealing with a situation wherein the City of Denver attempted to impose upon the utility, by means of an ordinance declaring its

right to carry water under the city streets to be merely "at sufferance", rates based upon liquidation or "junk" value of the enterprise. The Supreme Court, however, read this ordinance as failing in achievement of its declared purpose. It found that it could not read the enacting provisions of the ordinance "as leaving the company actually without the right to maintain its plant in the City thereafter". "The alternative, which we adopt," the court said, "is to construe the ordinance as the grant of a new franchise of indefinite duration, terminable either by the City or by the company at such time and under such circumstances as may be consistent with the duty that both owe to the inhabitants of Denver." "In this situation," the court stated, "there can be no question of the company's right to adequate compensation for the use of its property employed, and necessarily employed, in the public service; nor can it be doubted that the property must be valued as property in use" (*supra,* pp. 190-191). On this basis, it was held that the utility's valuation for rate making purposes had to be higher than scrap.

The *Denver* case, wherein there was, apparently, no question but that the company would be an economically viable, profitable enterprise, given a reasonable rate, is to be contrasted with the *Market Street Railway* case, in which, by force of economic circumstances, no matter what the contemplated rate, the transit company would not provide any return on investment. (*Market St. Ry. Co.* v. *Commission,* 324 U. S. 548, 565.) There the Supreme Court indicated that even salvage value could be utilized as the basis for determining the rate to which the company was entitled. (*Id.,* p. 568.)

The majority compounds its error in considering the public's need for this property with the illogic of utilizing "original cost" as a basis upon which, with adjustments, the amount of claimant's award should be determined. As Mr. Justice CLARK pointed out in *United States* v. *Toronto Nav. Co.* (338 U. S. 396, 403), "Original cost is well termed the 'false standard of the past' where, as here, present market value in no way reflects that cost." The only source

even approaching the status of authority that the majority can find to justify an award based on original cost is *Matter of City of New York* (265 N. Y. 170) where this court held that the city had to pay the condemnee for the original cost of presently valueless easements of light and air it had earlier been required to purchase. The majority takes no note of the comments of Mr. Justice CARDOZO on this aspect of the case when it came before the United States Supreme Court. There he declared: "Much could be said in support of the position that the value of the so-called easements was nothing more than nominal. * * * We do not go into that question now, for the city and the abutters are not petitioners in this court, and must acquiesce in the award as made. * * * Enough for present purposes that the award is not too low, though perhaps it is too high." (*Roberts* v. *City of New York, supra,* p. 282.) The comment of Mr. Justice CARDOZO later in his opinion in *Roberts* to the effect that the value placed upon the physical assets of the Manhattan Railway Company as scrap might be too low were it not for the award made for the easements in no way supports the proposition that the owners of that railway were entitled under the Constitution to compensation for their taking. It seems clear that Mr. Justice CARDOZO at that point in his opinion had reference only to the determination of scrap value made by the courts below and there was pointing out that any complaint the condemnees might have with respect to this determination was more than sufficiently cured by the award for the easements of light and air. The action of this court in sustaining an award for the taking of these easements which were no longer of any value to the condemnees may most generously be characterized as the product of a momentary lapse, perhaps in part occasioned by a too harsh determination of the road's scrap value, and this I think our former Chief Judge fully realized. The case lends little support to the action of today's majority. (Even Special Term recognized this, distinguishing the case on the basis that there the property was condemned for destruction, a clearly invalid basis for distinction.)

Dissenting opinion per Burke, J.

Over and above what the majority proposes to award claimant for its tangible properties, it further proposes to allow an award for "going concern" value, the amount of which is to be determined upon remand. In contrast to the Fifth Avenue Coach Lines, whose lack of earnings was due to the action of the city in denying it a reasonable rate at which it could make a profit (witness the City of New York's highly profitable operation of these bus lines since the higher fare was inaugurated), this enterprise is "inherently incapable of profitable operation". (*Matter of City of New York* [*Fifth Ave. Coach Lines*], *supra*, p. 220). Economic viability, i.e., the capacity to operate at a profit, is, as the *Fifth Ave.* opinion makes clear, the *sine qua non* for an award of going concern value. (*Ibid.*)[4] This prerequisite condition has not been met here.[5]

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[4] In footnote 4 of its opinion the majority attempts to seize upon a remark I made in my *Fifth Ave.* opinion with respect to "dwindling profits". It fails to note that "dwindling profits" still means *profits*. The entire thrust of the *Fifth Ave.* opinion was that the bus company was capable of profitable operation, given a reasonable rate.

[5] Additionally, even the grossest comparison between the Fifth Avenue Coach Lines and the Hudson Tubes operations makes clear the lack of any constitutional requirement for an award of going concern value. The claimant in *Fifth Ave.* had organized and systemized an enterprise carrying each working day of the year about 1,250,000 passengers. This service was complementary to, not competitive with, the already overcrowded subway facilities in New York City. With a fare increase the enterprise became highly profitable. The Hudson Tubes, on the other hand, have in recent years experienced a continual decline in the number of passengers served. These passengers have been lost to other modes of transportation, especially buses and automobiles. It is conceded that with a fare increase so many passengers would be lost by this railroad that it would be in worse straits. Any value that this railroad once had, or might have had, as a going concern has been lost by the operation of economic forces. (Cf. statement by the dissent in *Matter of City of New York* [*Fifth Ave. Coach Lines*], *supra*, p. 229.) At its taking this was a *technologically* and *functionally* obsolescent railroad system.

Dissenting opinion per Burke, J.

The court in reaching today's decision pays lip service to the mandate it is under to determine the award for the New Jersey properties here in question under the requirements of the New Jersey and Federal Constitutions, but it is not an open question what the New Jersey and Federal authorities hold. They expressly reject the notion that special or unique value to the taker alone, the basis upon which the majority's suggested award is founded, may be considered in determining just compensation.

In what is perhaps the leading New Jersey case on this point the Court of Errors and Appeals, speaking in terms so unambiguous that one would not think its view could be disregarded by this court, declared, "Neither the individual advantages to the party acquiring the land, nor the necessity of its acquisition, can be considered in computing the [owner's] loss". (*Currie* v. *Waverly & N. Y. Bay R. R. Co., supra,* pp. 395-396.) The court there held that the property owner was improperly barred by the court below from introducing evidence as to the special value of his land to *other* potential purchasers than the condemnor, and thus reversal was called for (citing, among other cases, *Boom Co.* v. *Patterson,* 98 U. S. 403), but its statement of the rule applicable to the instant case leaves nothing to be desired in the way of clarity.

The very same rule was enunciated in *Yqra Eng. Corp.* v. *Newark* (*supra,* p. 464), where the Court of Chancery of New Jersey said: "The value [for compensation purposes] to be found is market value, what a willing buyer would pay in cash to a willing seller. In reaching the market value, consideration must be given to all uses to which the land may be put, and the owner be given the benefit of the best and most valuable use. But the special value of the land to the [condemnor], as distinguished from others who may or may not have power to condemn, must be excluded."

In *City of Trenton* v. *Lenzner* (*supra,* p. 476) the Supreme Court of New Jersey reiterated the rule long adopted

by the courts of that State, "The measure of compensation is the fair market value", and cited repeatedly and with obvious approval *Kimball Laundry Co.* v. *United States* (*supra*), wherein, it must be recalled, Mr. Justice FRANKFURTER very clearly pointed out that where gain to the taker is unrelated to any deprivation imposed upon the owner it must be rejected as a measure of the public's obligation under the Constitution to provide just compensation. (See 338 U. S. 1, 5, cited at 16 N. J. 465, 476-477.) Later in its opinion the court pointed out that a "foremost factor" in determining fair market value of a taken business "would be its prospective earning power evidenced in considerable part by past earnings." (16 N. J., p. 479.) Just compare this approach with that adopted by today's majority in this court.

Just recently the Appellate Division of the Superior Court of New Jersey, citing *Currie* and *Yara Engineering*, had occasion to remark that "Certainly, the State's purposes in acquiring [condemned] property would not be a proper consideration in fixing its value." (*State of New Jersey* v. *Wemrock Orchards*, 95 N. J. Super. 25.)

The majority, however, by the device of characterizing the instant case as *sui generis*, presumes to reject the New Jersey authorities and, rather, imposes its new and radical theory of what "justice" requires upon a situation in which the courts of New York have been authorized only to *apply* New Jersey and Federal constitutional law, not to create new and revolutionary law. The majority, by implication at least, recognizes that its proposed award is not required by the Federal Constitution (rather, it acknowledges that it must decide this portion of the case as if it were a New Jersey court), and, therefore, its disregard of the New Jersey authorities is in my view tantamount to a violation of the interstate compact authorizing this condemnation and conferring jurisdiction upon this court.

Dissenting opinion per Burke, J.

Even further, it can reasonably be argued that the condemnor, this bi-State agency, the creature of the States of New York and New Jersey, whose interests, however, are not necessarily coterminous with the interests of either State, has a right under the interstate compact to have applied even to determination of just compensation for the New York property here in question the law *as it existed* under settled principles heretofore followed in this State, not as it has just been drastically changed. An interstate compact is analogous in many respects to a contract (see *Dyer* v. *Sims,* 341 U. S. 22, 28-29) and the bi-State legislation constituting this compact, providing that the owner of the property thus taken should "not be awarded for such property any increment above the just compensation required by the constitutions of the United States and of the state or states in which the property is located or has its situs by reason of any circumstances whatsoever" (N. Y. L. 1962, ch. 209, § 14; N. J. L. 1962, ch. 8, § 14), may, especially since the requirements of all three Constitutions were formerly regarded as virtually identical, reasonably be read as incorporating the well-settled rules of law applicable to this case and as barring the sort of judicial amendment of our State's Constitution indulged in here today. The State of New Jersey, which has appeared herein by its Attorney General as *amicus curiae,* and the Port Authority, it would seem, have rights under this compact which must take precedence over our judicial solicitude for those financial interests, whoever they may be and wherever they may be located, that have seized upon this railroad as an object for speculation. Determination of these rights presents an important question of Federal law (see *Delaware Riv. Comm.* v. *Colburn,* 310 U. S. 419) to which the majority has not even alluded.

I would modify the Appellate Division's award only to the extent of reducing the award by $500,000, an amount representing cash assets of the Hudson Rapid Tubes Cor-

poration not taken in this proceeding, but mistakenly assumed by the Appellate Division to have been taken, and by allowing 6% interest on the New Jersey portion of the award. Other than this, I would affirm its decision based on the law and the facts.

Chief Judge FULD and Judges VAN VOORHIS, SCILEPPI and BERGAN concur with Judge KEATING; Judge BURKE dissents as to the decision on the appeal by claimant Hudson Rapid Tubes Corporation and votes to modify in a separate opinion; Judge BREITEL taking no part:

On appeal by claimant Hudson Rapid Tubes Corporation, order of Appellate Division modified, with costs in this court and in the Appellate Division, in accordance with the opinion herein and, as so modified, affirmed, and matter remanded to Special Term for further proceedings in accordance with the opinion herein.

On appeal by claimant Hudson and Manhattan Corporation, order of Appellate Division affirmed, without costs.

In view of the disposition herein, cross appeal of the Port Authority Trans-Hudson Corporation dismissed as academic.

APPENDIX B

Opinions of the Appellate Division

SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

November 1966

CHARLES D. BREITEL, J. P.,
BENJAMIN J. RABIN,
HAROLD A. STEVENS,
ARON STEUER,
LOUIS J. CAPOZZOLI, JJ.

Cross-appeals from final decree of the Supreme Court at Special Term (Loreto, J.), entered June 13, 1966 in New York County, insofar as it fixed awards on various damage parcels in a condemnation proceeding.

Whitney North Seymour of counsel (John A. Guzzetta, James J. Hagan, Eleanor M. Fox and Nancy M. Clarkson with him on the brief; Simpson Thacher & Bartlett, attorneys; Sidney Goldstein, attorney (Joseph Lesser, Milton H. Pachter and Robert S. Tobin with him on the brief) for petitioner-appellant-respondent.

David W. Peck of counsel (Theodore N. Tarlau, L. Robert Driver, Jr., John C. Jaqua, Jr., and Michael A. Cooper with him on the brief; Sullivan & Cromwell, attorneys) for claimants-appellants-respondents.

Arthur J. Sills (Alan B. Handler and David A. Biederman with him on the brief) for intervenor The State of New Jersey, as amicus curiae.

Louis J. Lefkowitz (Ruth Kessler Toch and Julius L. Sackman with him on the brief) for the State of New York, as amicus curiae.

STEVENS, J.:

These are cross-appeals by Port Authority Trans-Hudson Corporation (PATH) and claimants Hudson and Manhattan Corporation (H&M) and Hudson Rapid Tubes Corporation (HRT) from the final decree entered June 13, 1966, in a condemnation proceeding making awards for the Hudson Tubes Railroad and the Hudson Terminal Office Buildings, title to which vested in PATH. H&M is the fee owner of twin 22-story office buildings located at 30 and 50 Church Street, Borough of Manhattan. Special Term awarded $17,996,000 for the buildings based on a capitalization of projected net income. With that we are in accord and the award therefore is affirmed. Remaining for determination is the award to be made for the railroad, and what interest rate should govern.

Originally the Hudson & Manhattan Railroad Company (Company) owned and operated the realty owned by H&M and also the railroad owned and operated by HRT at the time of taking. Reorganization resulted in two separate corporations. Company continued its corporate existence as H&M, with HRT as a subsidiary. HRT became the owner of the damage parcels which constituted the railroad with the exception of three rights of passage and easement of which H&M was the record owner and HRT had the beneficial use. PATH took possession of this property September 1, 1962 by condemnation. Special Term awarded $55,000,000 for the railroad on the theory that its original cost should govern the determination of value. The original cost was $62,000,000. Special Term concluded that the tunnels represented approximately 50% of the value of the railroad and allowed the sum of $30,000,000 for the tunnels, $20,000,000 for the depreciated value of the remainder of the railroad property, plus $5,000,000 or 10% representing the going concern value. It was stipulated that approximately 65% of the railroad property was located in New Jersey. On such property the court allowed

interest at 6% and on the railroad property located within the State of New York Special Term allowed 4% interest.

The claimants urge that the award for the Church Street property was inadequate, the award for the railroad was inadequate, and the interest allowed on such awards is inadequate. PATH on the other hand contends that the award for the railroad is grossly excessive and that the interest on any award should be a uniform 4%. PATH urges that the award should not exceed the liquidation value of the railroad which it approximates at $3,500,000.

HRT urged and urges that the award for the railroad should be based upon reproduction cost less depreciation. More precisely, HRT offered testimony that the present-day cost of constructing the Railroad properties would be $521,763,469 and that the reproduction cost less depreciation on the basis of trended original cost would be $447,595,589. Using the unit price method of estimating reproduction, HRT offered testimony that the present-day cost would be $563,168,028 and that such cost less depreciation would be $488,462,153. These cost figures were based upon testimony given by members of the firm of Ford Bacon and Davis. HRT on appeal urges that the award should be increased to $127,400,000 for the railroad. It reaches this figure by averaging the lowest estimate in the record of reproduction cost less depreciation, $447,600,000 and the original cost of $62,000,000 which make a total of $509,600,000. This figure is divided by two and the resulting figure of $254,800,000 halved, which amounts to $127,400,000. The difficulty with that approach is that it is founded on no sound basis and consequently must be rejected. Thus it will be seen that PATH's approach of liquidation value and the claimants' approach of reproduction cost less depreciation and the original cost trended less depreciation are diametrically opposed.

When private property is taken for a public use, as occurred here, the law requires that just compensation be

paid (N. Y. Constitution, Article 1, § 7(a); N. J. Constitution, Article 1, para. 20; U. S. Const. Amend. 5 and 14). When the Port of New York Authority, the parent body of PATH, was created, it was envisaged that it might be necessary or convenient for it from time to time to acquire real property or other property. More particularly the States of New York and New Jersey authorized in 1961 the development of a World Trade Center by the Port of New York Authority. They found, *inter alia*, "(2) that in order to preserve the northern New Jersey-New York metropolitan area from economic deterioration, adequate facilities for the transportation of commuters must be provided, preserved and maintained and that rail services are and will remain of extreme importance to such transportation of persons; (3) that the interurban electric railway now or heretofore operated by the Hudson and Manhattan railroad is an essential railroad company facility serving the northern New Jersey-New York metropolitan area; that its physical plant is in a severely deteriorated condition; and that it is in extreme financial condition; (4) that the immediate need for the maintenance and development of adequate railroad facilities for the transportation of persons between northern New Jersey and New York would be met by the acquisition, rehabilitation and operation of the said Hudson & Manhattan interurban electric railway by a public agency, and improvement and extensions of the rail transit lines of said railway to permit transfer of its passengers to and from other transportation facilities and in the provision of transfer facilities at the points of such transfers (Laws of 1962, c. 209; N. J. Laws 1962, c. 8; see N.J.S.A. 32:1-35.50 to 32.1-35.68 approved February 8, 1962; see also Laws of 1961, c. 312, for earlier legislative findings [McK., Uncon. Laws, § 6601]). However, it was specifically provided in connection with the condemnation of property that "the owner of any property acquired by condemna-

tion or the exercise of the right of eminent domain for any of the purposes of this act shall not be awarded for such property any increment above the just compensation required by the Constitution of the United States and of the State or States in which the property is located by reason of any circumstances whatsoever" (*ibid.* McK, Uncon. Laws, § 6614). The law, both constitutional and statutory, requires that just compensation, and no more than just compensation be paid. In determining what constitutes just compensation several methods of approach are possible. A brief consideration of some of them will determine whether they are feasible or conducive to the desired result.

PATH acquired by eminent domain on September 1, 1962, a railroad which had undergone reorganization as a result of a petition filed August 11, 1954, by three of the railroad's bondholders. The reorganization was terminated December 31, 1961, and title was taken by PATH less than one year later.

The Hudson and Manhattan Railroad Company (predecessor of HRT and H&M) admittedly was unable to meet its debts as they matured. In reaffirming approval of the petition for reorganization it was noted that assets available to meet the debts fell far short of the sums required, and prospects for the future were dismal (*In re Hudson & Manhattan Railroad Company*, 138 F. Supp. 195 (1955)). Insofar as the actual railroad operation was concerned, the railroad had failed to earn its interest and expenses for several years. The rolling stock was old, in some instances in a hazardous condition, most of the cars having been acquired between 1909 and 1911, the most recent being 20 cars acquired in 1928. In its opinion the court (Walsh, J.) stated there was no possibility of avoiding a default on bonds due February 1, 1957 (approximately $46,339,404.62). A property amortization fund, established as required by the terms of the mort-

gage indentures, had been totally exhausted in 1952, and only a small part of the fund had ever been used for the intended purpose. Additionally, there was a combined deficit of $818,857.55 comprising $406,542.55, the deficit of current liabilities, plus $358,295 representing the minimum program of authorized expenditures to maintain and permit safe operation of the railroad. The reorganization plan proposed by the Trustee in bankruptcy was submitted by the District Court, Southern District, to the Securities and Exchange Commission (SEC) for examination and report. The advisory report of the SEC thereon (38 Securities Exchange Commission Report 676 (1958)) approved the proposed plan with suggested minor modifications. The report discussed the continuous decline in passenger commuter traffic and noted even though fare increases had been obtained from time to time, resulting in increased operating revenues, operating expenses had increased also. Such expenses "tended to reduce the margin of operating income, leaving the debtor with operating deficits in each year for the period 1949-1957 with the exception of 1950 and 1952" (p. 702). The SEC report referred to a March 17, 1958 opinion report of Ford, Bacon and Davis (the same firm which testified as to reproduction costs for claimant on the trial herein appealed from) which placed a value for liquidation purposes of "$1,278,200 on the tangible railroad properties and of $525,000 on the tunnels or a combined value of $1,802,200" (p. 707). Parenthetically, this report and a later report of Ford, Bacon and Davis dated March 17, 1960, both submitted to the trustee at his request, were excluded from evidence on the trial in this case. This was error for reasons hereinafter stated. Reference was made to $1,700,000 spent for the purchase of 20 new railroad cars, and the fact that $500,000 cash would be provided by the Company for the working needs of HRT. The SEC report concluded the overall valuation of the assets to be acquired by HRT amounted to $3,500,000.

In a proceeding commenced in 1959, in the United States District Court, Southern District, for approval of the plan of reorganization proposed by the trustee in bankruptcy, the court (Dawson, J.) found the debtor insolvent and approved the plan for reorganization (*In re Hudson and Manhattan Railroad Company,* 174 F. Supp. 148, aff'd *sub. nom. Spitzer* v. *Stichman,* 278 F. 2d 402). The court found "the value of the assets to be acquired by the railroad company under present and reasonably foreseeable circumstances, aside from the potential values that might be realized upon a sale of the railroad to a public agency, is not in excess of $3,500,000 and that the amount that could be realized in the event of such a sale is no more than $4,000,000" (p. 166). The reorganization was terminated December 31, 1961.

In the condemnation hearings evidence of reproduction cost, less depreciation, and of original cost ($62,000,000) trended upwards, was offered by claimant HRT. Baldin, vice-president of Ford, Bacon and Davis, and "group seniors" from that firm's staff testified as to estimates of reproduction cost new and less depreciation as of September 1, 1962. While subjecting Baldin to cross-examination PATH's counsel sought to introduce in evidence portions of a document dated March 17, 1960, entitled "Report, Present Value of the Railroad Properties of Hudson & Manhattan Railroad Company", and to question Baldin thereon. The document had been prepared by Ford, Bacon and Davis at the request of the Trustee in Reorganization and submitted to him. Objections to the offer and to certain questions with respect thereto were sustained. Similar treatment was accorded a salvage report of the railroad, dated February 28, 1958, also prepared by Ford, Bacon and Davis at the request of the Trustee, submitted to him, and the substance of which, if not the actual report, had been before the SEC and the Federal Court. Certain questions with respect to the report were not permitted. The Trustee at the time

he requested and obtained the reports was under the supervision of the court and acted for and in place of the then debtor in reorganization (see 11 U.S.C.A. § 110). Exclusion of the reports and the undue circumscribing of cross-examination with respect thereto, as well as certain questions seeking to elicit whether Baldin considered certain factors in reaching stated conclusions, was error. Having expressed certain opinions, inquiry should have been permitted as to data and factors considered in reaching such conclusions (*United States v. Ham*, 187 F. 2d 265; 3 Wigmore, Evidence (3d ed.) § 992). The reports were relevant to the issue before the court which was to determine the value of the properties. The testimony of the witness and the reproduction cost estimate reports were so inconsistent with the earlier reports submitted by the firm that cross-examination should have been permitted to impeach the credibility of the witness (Civil Practice Act § 343-a, now CPLR 4514; *Matter of City of New York* [*Brooklyn Bridge*], 50 Misc. 2d 478, 480; *Larkin* v. *Nassau Electric R.R. Co.*, 205 N. Y. 267; *Kesten* v. *Forbes*, 275 App. Div. 646).

The excluded reports also tended to prove facts differing from those asserted at the trial. If the views of the witness, Baldin, and the substance of the reports varied with the necessities of the case that could properly have been shown (*Brooks* v. *Rochester Railway Co.*, 156 N. Y. 244, 250). The reports could also have been received as admissions against interest. Certainly such reports contributed to the position which the claimant was attempting to prove in this proceeding. Not only had the Trustee ordered and accepted the reports, but actual use had been made of the 1960 report in seeking state tax adjustments. It is clear also that the 1958 report was adopted and utilized by the railroad company in the court proceedings (cf. *People* v. *Burgess*, 244 N. Y. 472; see 4 Wigmore, Evidence (3d ed.) § 1048 et seq., § 1073). Moreover, as admissions of value by the owner and the pro-

spective amount of damages to be suffered made reasonably near the time of taking, the reports should have been allowed in evidence (18 Am. Jur., Eminent Domain, § 349; 20 Am. Jur., Evidence, § 583; *Sparkill Realty Corp.* v. *State of New York,* 254 App. Div. 78, 82, aff'd 279 N. Y. 656; cf. *United States* v. *Toronto Nav. Co.,* 338 U. S. 396). Since it is concluded the exclusion of the reports was error, they are hereinafter considered as received in evidence and reference to their contents will be made as necessary or deemed advisable.

Market Value

The approach frequently used in determining value of property taken by eminent domain is to try to ascertain its market value. As here used this should be construed to mean the price at which an owner could have sold the property to another if the property were not taken, or "the sum of money a willing purchaser would pay * * * and a willing seller would accept" (*Sparkill Realty Corp.* v. *State of New York,* 254 App. Div. 78, 82, aff'd 279 N. Y. 656). "In order to arrive at an estimate of the fair market value of the property in question all those things which would be considered by a buyer and a seller, neither under compulsion, neither having an advantage over the other, must be taken into consideration by a witness competent to assemble, weigh and translate them into dollars and cents. All the facts and circumstances which a buyer and seller would consider in connection with the purchase and sale of a piece of property are relevant and material in arriving at a determination as to its market value" (p. 82). The foregoing illustrates also a further reason why the excluded reports should have been admitted into evidence.

The difficulty in evaluating this property in terms of market value in the conventional sense, is that properties of this sort are in a sense unique and are rarely if ever

bought and sold in the open market. Since the operation of the railroad, financially, was a losing proposition, any attempt to capitalize earnings as an element for consideration in order to fix a price is equally unsatisfactory. Such a method provides an alternative to market value. Past earnings would be especially significant if they tended to reflect possible future profitable operation, or if such earnings were the result of an artificial or forced restriction (cf. *Matter of City of New York (5th Ave. Coach Lines)*, 18 N. Y. 2d 212). The evidence indicated that the railroad was incapable of profitable operation. Under such circumstances the concept of a willing buyer in an open market must be discarded. Ordinarily no one will buy an unprofitable venture especially where, as here, there is a prospective inability to compete successfully against other available modes of transportation.

The Substitute Facility Doctrine

This doctrine has developed as an alternative to the market value rule. Courts have developed the doctrine "[T]o meet the unique needs of public condemnees; damages will be awarded sufficient to finance a replacement". It is also applied when there is no ready market for certain public facilities, when market value is inappropriate, or when "the public property has a market value, [b]ut that standard is inadequate" (Just Compensation and the Public Condemnee, 75 Yale Law Journal 1053). It is pointed out, however, that the rule as to damages sufficient to finance a replacement is qualified "by holding it is applicable only if a replacement is 'necessary.' Some courts have demanded in addition that the necessity be 'legally compelled', and have granted compensation to replace only those facilities which the state or municipality was legally obligated to provide" (ibid.). Sometimes the doctrine is defined to mean the obligation "to provide such substitute facilities as are 'necessary' to carry out the public function served by the

condemned property'' (*United States* v. *Certain Land in Borough of Brooklyn, etc.*, 346 F. 2d 690, 695). Where there is no compulsion by law, and there is none in the case on appeal (though the facility is termed ''essential''), whether the facility is ''necessary'' becomes a fact question. Implicit in the term ''necessary'' under these circumstances, is some possible recognition of social needs and values.

If there were no Tubes available would it be necessary to replace them with a substantially similar facility in order to absorb the flow of passenger traffic carried by it between the states of New York and New Jersey? I think not. In the peak hours of early morning traffic HRT carries approximately 20-22% of such traffic. This is for a relatively short period. Thereafter much of the equipment remains idle until the next peak period. From 1948 when approximately 27.7% of commuter passenger traffic was carried, to 1964 when approximately 11.4% overall was carried, there is a decline of approximately 60%. Ferries and other railroads have also shown a substantial decline and the financial condition of some of the railroads which serve as feeder lines to HRT is poor. Other modes of transportation, such as buses and automobiles, have shown a substantial increase. The use of the tunnels (Lincoln, Holland) and the bridges (George Washington and others) has increased. Each new tube addition for automobile and bus traffic was followed by a decline in passenger traffic carried by HRT and its predecessor. Hudson County, New Jersey, which supplies 45% of claimant's commuter traffic, has shown a population decline in recent years. A 20-25 year projection of population growth in the area serviced, of job opportunities, of the development of residential urban and suburban areas, of industrial complexes, highway construction and possible and probable expansion of existing facilities lead to the conclusion that replacement is not necessary. In fact, but for condemnation, this enterprise

in all likelihood in the near future, would have died of malnutrition. Moreover, to make an award on the theory of a substitute facility would far exceed the just compensation required by law. It would mean the award of a sum sufficient to pay for the cost of acquiring an acceptable substitute property. It might be noted whether or not one agrees with the conclusion as to necessity, an award premised upon the substitute facility doctrine, is likely to represent a negation of the fundamental principle of what the owner has lost, and be based instead upon what the condemnor has gained.

Reproduction Cost

This is the basis, somewhat modified, on which claimant seeks compensation. Reproduction cost, new and with depreciation, was offered as evidence of some indicia of the present value of the property. Obviously, at most, such cost would set the upper limit of valuation. Here the original cost was also trended upwards by applying to it a trend factor to bring the various included costs up to 1962. The original cost was so remote in time it is questionable if it is of real value here. (See *Kintner* v. *U. S.*, 156 F. 2d 5; 1 Bonbright, Valuation of Property, p. 144 et seq.) The hypothesis in using reproduction cost is that the identical plant is to be reproduced, and that present value equals reproduction cost new less actual depreciation. In property of this nature that includes both physical and functional depreciation. (See 2 Orgel (2d ed.), Valuation Under Eminent Domain, Ch. XVIII, § 206, et seq.) In order for reproduction cost to have validity as evidence of value, it should be shown that the property would reasonably be expected to be reproduced (*Matter of City of New York* (*Maxwell*), 15 AD 2d 153, aff'd 12 N. Y. 2d 1086; aff'd also *sub. nom. Mtr. City of N. Y.* (*Schnurmacher*), 16 N. Y. 2d 497). It should be shown also that reproduction at such cost figure represents a reasonable commercial investment

(see *Spitzer* v. *Stichman*, 278 F. 2d 402, 410). "[R]eproduction costs must be on the basis of the plant as existing at the time of the appropriation and not upon a supposititious value based upon a new plant and what it would produce." (19 N. Y. Jur., Eminent Domain, § 237; *cf. Re: Board of Water Supply*, 121 Misc. 204). Here the taking is of an entire business enterprise shown to be unprofitable. Operating income less operating expenses, plus depreciation, resulted in a constant deficit. Obviously, this is not such a good commercial investment as to provide an incentive for investment and reproduction. Since there was no reasonable showing this property could be reproduced as a good commercial investment this approach was unsound (*United States* v. *Boston, Cape Cod & New York Canal Co.* (1st Cir. 1921), 271 F. 877). Evidence of cost reproduction by testimony of cost reproduction studies, if at all relevant, was of little value here. Conditions precedent to its application were not shown. At most and under proper conditions reproduction cost less depreciation would not have been conclusive but only a factor to be considered (*Matter of Huie*, 2 N. Y. 2d 168). Evidence of losses and expenses since condemnation, if permitted, would have been relevant in the issue of possible future profitable operation, a factor which could have influenced buyer incentive (*cf. Matter of City of New York* (*Manhattan Railway*), 365 N. Y. 170, aff'd *sub. nom. Roberts* v. *City of New York*, 295 U. S. 264).

Valuation of units or elements by reproduction-cost estimates and totalling the resulting figures to reach an amount represented as reproduction cost for the whole, resulted here in a gross over-evaluation. "The replacement-cost method is theoretically applicable to the valuation of an entire physical plant whenever the plant, were it to be totally destroyed, would be worth replacing." (1 Bonbright, Valuation of Property, p. 171.) If it were not to be replaced by a substantially identical property, "the hypothesis that the value of the existing property is de-

rivable from the current cost of constructing or buying a substantially identical property is always invalid" (ibid, p. 163). The construction utilized here, with particular reference to the tunnels, would not be used today. These tunnels are much smaller in diameter than other commercial tunnels since constructed in the area, and are not readily adaptable, if at all, to modern improvements to meet present-day needs in order to make the enterprise a profitable one.

Just Compensation

In addition to the approaches heretofore mentioned, the securities valuation approach, the capitalization method, and consideraion of cash throw-off are also sometimes utilized. Since neither of these methods are being discussed extensively, a brief reference to each is being made under the above general heading.

The term represents the constitutional and statutory mandate for indemnification of the condemnee. The property is to be valued as of the time of the taking.

"The question is what has the owner lost, not what has the taker gained." (*Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195; *Roberts* v. *New York City,* 295 U. S. 264, 282; *Ringwood Company* v. *North Jersey District Water Supply Commission,* 105 N. J. 165, 169). "What the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots." (*New York City* v. *Sage,* 239 U. S. 57, 61). Since there was no ready market, or indeed any market for the subject property, market value in the ordinary sense cannot be used as a criteria of evaluation. But the basic principle of compensation to the owner to make him

pecuniarily whole should control (*Village of St. Johnsville* v. *Smith*, 184 N. Y. 341; *St. Agnes Cemetery* v. *State of New York*, 3 N. Y. 2d 37, 41).

There was testimony (using the securities valuation approach) that the market value of the property actually condemned (including the Church Street property), with certain allowances deducted, was $16,997,782. The market evaluation of the railroad under such approach was $3,802,000. In this case, because of the relative inactivity of the stock for a period of time and the market fluctuations attendant upon prospective condemnation announcements, such an approach is less than satisfactory. (See also, 1 Bonbright, Valuation of Property, p. 245 et seq.; 2 Orgel, Valuation Under Eminent Domain, § 220 (2d ed.).)

There was testimony the railroad showed a constant deficit in both net income and operating income in the years prior to the takeover. Capitalization of realized earnings, or even of annual earnings reasonably anticipated (prospective income) while relevant and a proper consideration, is not a suitable criteria here. The earnings, less fixed charges, operating expenses and depreciation resulted, invariably, in railroad deficits. The realty, now owned by H&M, had to carry the burden. Utilizing any reasonable rate to capitalize a deficit would not change this picture (*cf. Onondaga County Water Authority* v. *New York Water Service Corp.*, 285 App. Div. 655). When prospective income is used as a factor in capitalization there is an element of pure speculation involved. If the earnings can be reasonably anticipated the speculative factor is minimized but not eliminated. Certain extraneous factors such as business skill and proper management remain. When the past record is one of deficit operation there is little to capitalize unless an artificial condition is created by non-recognition of essential, or important factors.

There was testimony on behalf of claimant of cash throw-off (exclusive of capital expenses and construction) for the years 1958-1961 inclusive of $241,000, $101,000, $80,000 and $117,000 respectively for the railroad. Cash throw-off as there used eliminated amortization and depreciation. Since operating losses existed for each of the years, the cash flow figures presumably consisted of net profit, or deficit, plus items not requiring cash outlays in the particular years, but which items were charged to operations. The figures apparently included concourse rentals as revenue, offset to some extent by expense items. The source property was transferred to H&M in the reorganization and is no longer available to HRT. The cash throw-off figures here are of doubtful value and somewhat unrealistic. If fixed obligations are not met and proper maintenance and replacement of physical properties when needed, not observed, disaster may be postponed but it is inevitable. The whole operation will eventually collapse.

Using some of the same data, for like periods, as shown in claimant's exhibit indicating cash throw-off, but including amortization, at least for 1958 and 1959, PATH offered testimony of present value as of August 31, 1962 of $1,209,-134. That figure represented the witnesses' view of what a purchaser would pay assuming the railroad operating earnings, before depreciation, could be expected to continue for 15 years, without equipment replacement with an interest rate of 12%.

Returning to the principle deemed applicable here, i.e., what has the owner lost for which it should be compensated, we consider the rounded figure of $1,700,000, the cost of 20 new railroad cars. The takeover, in point of time, followed so shortly upon the acquisition that the full amount should be allowed. The cars should be readily saleable, commercially, and there is little reason not to allow full value. Five Hundred Thousand Dollars (a part of which was derived from realty funds) was given HRT to cover certain estimated operating expenses. This also

should be allowed as a full item, resulting in a total of $2,200,000. The further question is what should be allowed for salvage value for the other properties.

There was testimony by PATH's expert that the highest and best use of the railroad as of September 1, 1962, was to liquidate the property. His opinion was based upon the conclusion that continued operation as a private enterprise would result in continued monetary loss. His estimate based on the foregoing was approximately $1,022,000.

The principle enunciated in *Matter of City of New York (Manhattan Railway Company)*, 265 N. Y. 170, aff'd *sub. nom. Roberts* v. *City of New York,* 295 U. S. 264, is relevant here. In that case it was shown that an elevated railroad was incapable of profitable operations. The court held, where such is shown, that only scrap or salvage value should be allowed for its structures. Reference has already been made to allowance which should be given for the cash advance made to HRT and for the purchase of the new cars. It follows that something more than salvage value is warranted. Liquidation value becomes market value in the broad sense and is the standard properly applicable.

Claimant relied heavily upon the reproduction cost estimates prepared by Ford, Bacon & Davis as indicia of value of the railroad at the time of taking. This same company in 1958 and 1960 had prepared and submitted to the trustee in reorganization reports widely and substantially at variance with its reports and testimony in the present case. The contention that such reports were prepared in different proceedings and for a different purpose, and consequently could not be utilized or considered in this proceeding for any purpose, must be rejected. Either the reports were honest and accurate as to the facts therein stated, and honest and sincere in the opinions reflected, as of the time of submission, or they were not. A like observation might be made as to the reports submitted in this proceeding. From our early discussion of the prior reports it is apparent that the

reports of March 17, 1958 and March 17, 1960 were properly admissible, (1) not as proof of their contents, but for purposes of impeachment as affecting the credibility of its authors (*Matter of City of New York*, 50 Misc. 2d 478, 480); (2) such reports should have been received in evidence for other purposes as well because of the circumstances under which they came into being (earlier adverted to) and because they were adopted and used by the trustee in reliance upon their contents and the opinions expressed therein.

The opinion expressed in the letter of Ford, Bacon and Davis dated March 17, 1958, addressed to the trustee, was that the maximum value of the "companies tangible railroad properties at February 28, 1958" was $1,278,200. To this figure, in their view, there could possibly be added a figure of $525,000, estimated economic value for continued tunnel cable usage by the telephone companies based on then current rentals.

The letter dated March 17, 1960, and accompanying report to the trustee, expressed an opinion of Ford, Bacon & Davis of an increased salvage value. The items, the basis for the opinion, were enumerated and their estimated values stated. The 20 new cars represented an added factor of value. Their opinion of total salvage value from liquidation was $2,573,800.

Ford, Bacon & Davis went further in their analysis of the situation, and expressed the view that the salvage value represented a minimum value because the public would not permit a cessation of operations and liquidation, and that the railroad's value depended upon the price it could command in a sale to a public authority. Proceeding on certain stated assumptions and probabilities, chief of which was sale to a public authority, it was the opinion of Ford, Bacon & Davis that the "present value of the H&M railroad properties, as an operating enterprise, is $8,000,000."

No satisfactory explanation appears in the record for the difference between the figures above quoted and the indicia of value testimony on reproduction estimates, as indicative of the value of the railroad.

The figure of $525,000 (economic value based on continued cable rental use) should not be added to the $2,200,000 (new cars and cash advance). It was uncertain and contingent. The testimony at trial with reference to value at the time of taking ranged, depending upon the circumstances, from slightly above $1,000,000 ($1,022,000 liquidation value) to a figure of $1,290,134 as value deferred liquidation, plus $182,000 representing present value estimated at the end of fifteen years.

Here the owner of the railroad properties was relieved of the burden of continued operation of an unprofitable enterprise. Such enterprise had lately, shortly prior to takeover, been adjudged insolvent and the outlook for the foreseeable future was not good. Maintenance and replacement of physical properties, where needed, would require substantial expenditures. Even a fare increase, if the pattern of the past was repeated, while affording income support, would result in a decline in passenger carriage. The process could be repeated indefinitely. The fact that the taker in condemnation would continue to operate the railroad because it had received a possible loss offset in the proposed World Trade Center, does not increase the actual loss suffered by the owner, nor increase the liquidation value of the property taken. While salvage value cannot be determined with mathematical precision, a reasonable figure based on all the evidence received, and which should have been received, is $1,300,000 (rounded). Adding this figure to the sum previously calculated would result in a value liquidation of $3,500,000, and such is the figure now set. To recapitulate, new cars $1,700,000, $500,000 working capital, plus $1,300,000 salvage, equals the liquidation value, which is determined to be just compensation.

Evidence was received concerning possible benefits which might have accrued from the so-called Aldene Plan when, as and if it were brought to fruition. Not much evidence was received as to the possible cost and necessary expenditures involved. No value is attributed to the properties here (as of the time of taking) because of it. At the time of taking the Plan was little more than an abstraction and its possible influence and results too speculative.

In urging that the court failed to give significant weight to reproduction cost less depreciation, and that the railroad award should be increased to at least $127,400,000, claimant HRT, *inter alia*, cites *Matter of City of New York* (*Fifth Ave. Coach Lines*), 18 N. Y. 2d 212, in support of its position. It urges that its approach as to reproduction costs finds support therein and since HRT, like the coach lines, is an operating enterprise, going concern value should be allowed.

Going concern value seems to refer to certain intangibles in an operating business where the entire enterprise is taken (see, generally, 2 Orgel, Valuation Under Eminent Domain (2d ed.) Ch. 18, § 214 et seq.). The concept represents value for an existing established business as distinguished from value for the physical properties and "is allowed on the theory that a prospective purchaser would pay more for a 'live and developed' business than for the 'bare bones' of the utility plant" (ibid, § 216, p. 123). It would seem that before the concept is applicable there should be a determination the enterprise is capable of profitable operation. (*Cf. Matter of City of New York* (*Sixth Ave. El. R.R.*), 265 App. Div. 200, 206). In the cited case it was said "[i]f the court should determine that the Sixth Avenue Line was capable of profitable operation, *then* some fair measure of the value of the railroad as a going concern would have to be applied. Just compensation being required, the full and fair equivalent of the property taken is essential (*Monongahela Navigation Co.* v. *United*

States, 148 U. S. 312" (emphasis supplied). In *Matter of City of New York* (*Fifth Ave. Coach Lines*), *supra, the* court found that claimants were entitled to reasonable fares and such fares had been denied them. It found further that claimant's capability for profitable operations, upon recognition of such right, was clearly demonstrated "and they are, therefore, entitled to going concern value" (p. 221). In the case before us it is clearly shown that HRT is inherently incapable of profitable operations. Therefore, an additional allowance for going concern value is not warranted, and the properties are entitled to liquidation value only. Going concern value should probably represent some relationship between cost of acquisition and cost of development into a profitable business. The business here seems to have been started under such severe handicaps, including its capitalized structure, that it has not been able to cast off the burden. To allow going concern value here is to place a premium on deficit operations. This should not be done. The profitable portion of the formerly united operations of real estate and commuter transportation is now being continued by H&M.

The remaining question has to do with the interest rate on the awards. The right to interest is an extension of the substantive right to recovery provided for by statute (McK. Unconsol. §2501). The dispute here is as to the rate to be applied. The court fixed at 4% on the New York properties which represented 35% of the whole. We are in accord with that determination (Laws of 1939, c. 585 [McK. Unconsol. §2501]; *Matter of City of New York (Maxwell),* 15 AD 2d 153, 179, aff'd 12 N. Y. 2d 1086; aff'd *sub. nom. Matter of City of New York (Schnurmacher Corp.),* 16 N. Y. 2d 497.) However 6% was allowed on the New Jersey properties. Sixty-five percent of the properties involved are located there. PATH and the Attorney General of New Jersey in his amicus brief recognize the right to interest (see, *State, by State Highway Commissioner* v. *Seaway, Inc.,* 46 N. J. 376, 217 A 2d 313). Both urge, however,

that the 4% rate should apply to the New Jersey property as well. New Jersey urges the interest rate, equitably, should be 4% for this unprofitable enterprise and that 6% would represent a windfall. PATH expresses a similar view. HRT urges the additional compensation, represented by interest, is indemnification for delay. Interest rates have increased generally and even the 4% provided by New York statute is outdated, unrealistic and unfair.

In the view here adopted no valid reason is shown for the difference in the applied interest rates. Equitably, a uniform rate should be applied, otherwise the New Jersey property is subject to a penalty by reason of situs. New York law establishes a 4% rate. Four per cent should be applied to the award for the entire property wherever situated.

The enabling statute under which the property was taken required that New Jersey law be applied to the property located in New Jersey (McK. Unconsol. § 6614) with the requirement that just compensation be paid for the property acquired by condemnation or the exercise of the right of eminent domain. New Jersey urges that market value, which in this instance is the scrap value of the railroad, is the applicable standard under New Jersey law. That the approach of allowing an award based on any theory of special value to the condemnor has been expressly rejected (*Currie* v. *Waverly R.R. Co.*, 52 N. J. 381, 20 A. 56). Because of the discussion and conclusions heretofore reached, it is not necessary to discuss New Jersey law separately and at length. The principles used herein as a basis seem to be in accord.

The judgment appealed from should be modified on the law and the facts to reduce the award to HRT for the railroad properties to the sum of $3,500,000, the liquidation value found for the properties, and to reduce the rate of interest on the applicable New Jersey portion of the properties to 4%, and as so modified the final decree

appealed from is otherwise affirmed, without costs and without disbursements to either party.

Breitel, J.P., concurs in the result in an opinion; Steuer, J., concurs in an opinion; Rabin and Capozzoli, J.J., each dissent in part in separate opinions.

BREITEL, J.P. (concurring in result):

I concur in the result but only with great reluctance, constrained as I am by the present authorities.

I am satisfied that no precedent in this State has expressly allowed a recovery in eminent domain on value to the taker and that the authorities state the contrary. The *Fifth Avenue Coach* case (18 N. Y. 2d 212) did give some recognition to such value. It allowed going concern value, thus recognizing that the assets taken had associated with them a selection, organization, and operating system of things and human beings which the taker desired and needed. The question, however, was somewhat obscured by the fact in that case, not present here, that a profitable return had been prevented by the prior conduct of the taker.

The essential fact in this case is that all parties agree that, so long as the Tubes are capable of moving passengers across the Hudson River, they will be so used in order to avoid the expense of the addition of new and substitute facilities to accomplish the same end. To that extent there is value to the taker and, indeed, that may be the only reason for the taking. There is an obvious ceiling to the value that anyone interested in using the Tubes would place upon them. That ceiling is the cost of providing transportation in substitution to that available through the Tubes. As to this, no proof was offered by any party in this proceeding.

There is no point to a burdensome elaboration of the economic principles involved. But it is worth noting that those principles have received recognition in situations

that compelled acceptance of the obvious economic fact that an asset that has value to anyone (that is, for which there is a demand) is an asset for the taking of which the owner is entitled to "just compensation". General market value, as has been noted so many times, is not the only basis for determining value. It is only the best way. Hence, the problem is oversimplified if it is concluded that value to the taker in eminent domain is no index to market value (4 Nichols on Eminent Domain §12.2 at pp. 41, 47; *United States* v. *Certain Property, Etc.*, 306 F. 2d 439 at 447 [C.A. 2d per Friendly, C.J.]; see, also, *Matter of Huie*, 2 N. Y. 2d 168 at 171. Compare *United States* v. *Cors*, 337 U. S. 325 at 332, 333 in which it is explicitly stated that market value, when available, is not identical with just compensation and in which there is also a statement of the traditional preclusion of value to the taker). In other states, several cases have arisen involving the condemnation in eminent domain of public utilities that had become unprofitable and with no economic prospect of being made profitable. To that extent, the economic problem is the same as that in this case. The courts, in these rare cases, held that under such circumstances the value to the taker was to be considered and, as a facet of that value, the cost of necessary substitute facilities (e.g. *Re City of Eureka*, 19 Cal. R.C.D. 952, 957-8; *Re City of Oroville*, P.U.R. 1922 E 451, 469-471; but see 1 Bonbright, Valuation of Property 442-3).

Some of the leading authorities have also referred to the problem presented by hopelessly unprofitable enterprises which nevertheless have a value in their continuance by government in order to avoid greater expense in the substitution of new or different facilities (2 Orgel on Valuation Under Eminent Domain, §217; 1 Bonbright, *op. cit., supra*, 442-3).

On no view of the matter should the question be confused with the replacement of substantially similar facili-

ties. Of course, no one would duplicate the existing Tubes. Nor is it disputed that substitute facilities of a different character would have to be supplied if the Tubes are not used at all for the movement of passengers. Those substitutes might consist of additional tubes to the existing tunnels, the addition of lanes to the existing bridge across the Hudson, or whatever the ingenuity of man might suggest to transport those who would otherwise have used the Tubes. One thing is clear: there would be some cost or expense involved in moving the additional passengers over existing or substitute facilities. In this connection, one does not have to speculate as to whether government would make the moves necessary to utilize the Tubes or to provide a substitute facility. Recent history and the circumstances of this case demonstrate that such action has occurred.

STEUER, J. (concurring):

I concur not only in the result but also in the implicit findings of the majority opinion and the reasoning that produced the conclusions. That opinion, probably very wisely, does not advert to an argument which, though never advanced by the claimants, I believe to be inherent in their contentions and, in fact, the only substantial argument that could be advanced in support of their claim for additional compensation.

That argument is this: When a utility company performs a necessary public service, which some branch of the government will have to perform if the utility goes out of business, it has a potential customer for its business and the market value of its property is what the branch of government would pay for it. A more conclusory statement of the same argument would be that the franchise to supply an essential service is a compensable asset regardless of whether the service is or can be profitable to the company rendering it. It should be understood that the circumstance that this underlying argument is stated in more precise

terms than counsel deemed advisable to incorporate in their briefs, means merely that it is recognized but not that its validity is accepted.

It cannot be disputed that there is no constitutional or legal obligation on any branch of government to supply the service previously supplied by the claimant. The fact that a governmental agency was empowered so to do does not indicate the existence of any such duty. The stockholders were never in a position to confront any government or governmental agency and say, in effect: We are no longer able to maintain the property with which this service is supplied, so you must supply the service, and the most economical way of so doing is to buy our installation. So that the possibility of government operation never constituted an enforceable right which might either be sold or relied on as a guarantee of receiving a sale price which reflected the operation of a business. Nor does the fact that railroads in many instances have received subsidies in one form or another establish any right or provide any basis for calculating the income of the road as if such a subsidy had been granted. The implications embraced in the concept of a right to subsidies involves basic and radical changes in our whole economic and social structure. To premise that such subsidies are to be considered in lieu of income is therefore impermissible. So, consequently, a conclusion that this railroad would be a profitable enterprise if subsidized is not even to be considered, much less assumed.

Even if it be assumed that it was a reasonable expectation that the governmental authorities would not allow the service to cease (that is, they would perform it themselves if no private person would), this expectation would not be a compensable asset. It is not necessary to repeat here the uncontested facts in the record, ably and amply set out in the majority opinion, that the prospect facing the stockholders of the claimant was complete loss of their investment as a result of the continuing losses from opera-

tion. This is what happened to those who were stockholders prior to the reorganization, and that it would be the fate of the present stockholders, absent condemnation, is virtually inevitable. How can it be assumed that the governmental authorities would intervene to preserve the service for those using the service, at any time prior to the final bankruptcy? No authority stepped in before the earlier stockholders were wiped out. Had the authorities waited, the plant could have been acquired at scrap value and the realization of this sum before it was entirely dissipated is all that the stockholders could reasonably expect. So under no theory of economics or accounting that has been called to our attention can the possibility of governmental acquisition be deemed an asset.

The application of the cost of an alternate method of supplying the service, that is, transporting the persons using the tubes, ties in with the above. This would be a maximum or ceiling recovery based on the theory that the condemning authority would not be obligated to pay more than that for supplying the service. But before this method of compensation could be invoked it would be necessary to show that there was an obligation to continue the service, and that the cost was less than what the facilities of the claimant could command in eminent domain proceedings. That is on the theory that the condemning authority would be entitled to perform the service enforced upon it by the most economical method. In any event, as the measure of compensation is the loss to the claimant, it is doubtful whether this method of compensation would have application in any situation except where the claimant utility was obligated to cease operations for other than financial reasons. Therefore, any such figure could not be significant here, as it could only be used if a proper award for the claimant's plant exceeded the cost of the substitute facility. That is not the claim here.

The dissenting opinion and the reluctance expressed in Judge Breitel's concurring opinion appear to draw their

inspiration from an idea that confining claimant's award to liquidation value works a hardship on claimant and constitutes a windfall to the authority, with the consequence that the result is unfair. Such a conclusion loses sight of the realities. The beneficiaries of the award, after payment of the corporate debts, will be the stockholders of the railroad. By virtue of the reorganizations through which the corporation has passed these are not the people whose investment built the road, but rather the various classes of creditors whose claims were converted into stock and people who bought stock from them for speculation. The record shows that the value of the stock on the market was $16,400,000 before condemnation was announced and fluctuated thereafter with the progress of the litigation, reaching a high of $27,100,000 when condemnation became a certainty. Instead of a value of $27,100,000, the dissent would provide a fund in excess of $61,800,000 or a windfall of over $34,000,000 to those speculators as a reward for their perspicacity and a corresponding penalty to the authority for undertaking the performance of a service which will be a continuous drain on its resources but will relieve the stockholders from the loss of their investment. Though it is inevitable, at times, that the established rules for determination of just compensation will provide a somewhat more fortunate result to the holder of its property taken than the ordinary commercial course would lead one to expect, it is difficult to understand why these rules should be abrogated or changed to produce the result contended for.

RABIN, J. (dissenting in part):

The petitioner, The Port Authority Trans-Hudson Corporation (hereinafter referred to as PATH) took, through condemnation, an active going essential transit facility for continued use as such and yet the majority of this Court has come to the conclusion that the claimant, Hudson Rapid Tubes Corporation (hereinafter referred to as HRT), from whom such property was taken, may only get

"liquidation value" which, in effect is salvage value, by way of compensation.

I dissent because I think there is no justification for such conclusion, and also because I believe that the amount awarded does not fulfill the constitutional requirement of just compensation for what was taken.

That the property taken was and is an active going transit facility is obvious. It was condemned for continued use as such and is now being so operated. That it is an essential facility can hardly be disputed. The Legislatures of the State of New York and the State of New Jersey, in authorizing the acquisition of this railroad found, among other things,

> "(2) that in order to preserve the northern New Jersey-New York metropolitan area from economic deterioration, adequate facilities for the transportation of commuters must be provided, preserved and maintained and that rail services are and will remain of extreme importance to commuter travel.
>
> "(3) that the Hudson and Manhattan railroad [the property condemned] is an essential railroad facility serving the northern New Jersey-New York metropolitan area . . .". (McK Uncon. Laws §6601).

Special Term properly found that in 1961, the year just prior to the taking, the railroad was responsible for the transportation during peak hours of 24% of all commuter traffic between New Jersey and New York. There is nothing in the record to indicate how that commuter traffic would or could be taken care of if this railroad were liquidated. Moreover, there is nothing in the record to indicate that there is any present substitute for the essential service performed by the Hudson Tubes, or that any substitute for the Tubes is being planned for use in the foreseeable future. Regardless of what might be said about the declining use of the facility, and regardless of the extremely questionable predictions with respect to the

declining population of the counties served by this railroad, at the time it was taken it was an essential facility and it is now. There is no proof to the contrary, and the Legislative authorization to condemn the Tubes is based upon such a premise.

I might also add that the Tubes, essentiality is indicated by its continued use by PATH. I would assume that if it were not an essential facility, PATH would not continue to maintain it if, as we are told, it could not be maintained on a profitable basis.

Why then should the condemnee be given only liquidation value for this most essential and active going transit facility?

The majority refers to the testimony of the expert for PATH as follows:

> "There was testimony by PATH's expert that the highest and best use of the railroad as of September 1, 1962, was to liquidate the property. His opinion was based upon the conclusion that continued operation as a private enterprise would result in continued monetary loss."

I would not want to believe that the majority, or even the condemnor, agrees with the conclusion of that expert that the "highest and best use of the railroad as of September 1, 1962, was to liquidate the property." The continued use by the condemnor of this property as a railroad demonstrates to the contrary.

However, it is urged that liquidation, or scrap value, is the proper standard to apply because the condemnee was operating, not at a profit, but rather at a loss, and that the railroad could not be operated by it at a profit in the foreseeable future. Accordingly, it is reasoned that inasmuch as, eventually, the condemnee must lose its property, it has lost nothing but scrap value by the taking. Special Term rejected this position and I believe rightly so. To begin with, at the time of condemnation the property was

not yet lost by the condemnee. At that time it was still operating the railroad as a going concern. It is as of the time of condemnation that we determine the value. At that time it was a useful and valuable property and giving merely liquidation value is not justified by saying that the company might lose it sometime in the future. PATH took an operating and running railroad and not scrap. What it took is what the condemnee lost, and the condemnee should be paid for an operating railroad and not for scrap.

We are told that PATH had no duty to take over this railroad. That is quite immaterial. Whether it took it because of duty or choice, it must pay for what it took. If the taking was simply by choice, it seems that it did so for good and valuable consideration, i.e., the right to condemn 13 square blocks of valuable property in the City of New York.

I do not think that the argument advanced with respect of the failure of the condemnee to operate on a profitable basis is controlling in the circumstances. We must be realistic. We must accept what is generally known to be the fact, that rapid transit facilities in the main cannot be operated profitably for a fare that the Authorities would permit the operator to charge. We must realize that there is now general acceptance of the fact that the furnishing of transit facilities is a matter of governmental concern and can almost be deemed to be a governmental function. The very Act that enabled PATH to condemn this property is a recognition of that fact. It is also generally recognized that the operation of these mass rapid transit facilities can only be continued by way of public subsidies. The Court could take judicial notice that the Staten Island Ferry cannot be operated profitably on a five cent fare, but is subsidized by the City of New York. The Fifth Avenue Coach Company received subsidies; the subway system and the present City bus system cannot operate unless subsidies are given; the State stepped in to make possible the continued operation of the Long Island Railroad and

the States involved are deeply concerned with the continued operation of the New Haven Railroad—tax assistance and other subsidies being furnished to assure continued operation of all of the above.

In this case it seems that not only was no subsidy of any consequence granted to the condemnee, but in effect the condemnee has been subsidizing the public in the performance of what is recognized as a government function. And now the Government, as represented by PATH, seeks to penalize this company for having done so. That is inequitable.

Nor do I think that the price at which the stock is selling at the market is here controlling, for such price is not necessarily equated with value of physical assets —especially so in this case where there are a multitude of factors that affect stock value. The law calls for the payment of just compensation for the property taken from the condemnee without reference to how the stockholders are affected.

What would be fair compensation in the circumstances of this case? The Port Authority takes the position that in condemnation, the condemnee can only receive market value of the property taken, i.e., what a willing purchaser would pay to a willing seller. Of course, that standard does not apply in this case because there is no market for the Tubes; there is no known willing purchaser. I agree with the majority that we cannot apply this standard.

I likewise agree with the majority that reproduction value less depreciation is not the proper standard to be applied. We must come to that conclusion inasmuch as, while the Tubes at present are a necessary transportation facility, it is clear that they would not presently be reproduced if new transportation were to be provided. That is not to say that they have outlived their usefulness, as is best proven by the fact that they were taken over for

continued use and will be continued in use for the foreseeable future.

Perhaps it would be proper to limit the award to what substitute facilities would now cost. However, there is nothing in the record to determine what this would be, nor is there anything to indicate whether it would be practical to construct substitute facilities. On this point, it should be noted that the Legislature has already determined that the present facility be continued. Indeed, it was to effectuate that determination that PATH was given the power to condemn.

The suggested alternative to these standards is liquidation or scrap value. I think that such standard would not meet the constitutional requirement of just compensation for the reasons given above. Moreover, liquidation value is not the proper standard because PATH took a valuable railroad property that was not to be scrapped and cannot be scrapped for the simple reason that it is an essential facility which must be maintained for the convenience of the public.

What then would be a fair standard to use? It seems to me that the most equitable and just standard of compensation would be to pay the condemnee its cost of the facilities taken. That is the minimum that it lost by the taking. That cost, as appears from the record, is $61,874,440.01. In allowing that sum I do not give the condemnee the benefit of the vastly increased worth of these properties if we were to consider the increased cost trend. Present day reproduction cost minus depreciation would be seven times the original cost. It should be noted, that included in this figure is the original cost of passenger cars. No reduction should be made of this item. Recently, $1,700,000 was expended for new cars which, together with the other cars on hand at the time of condemnation, should easily reach the amount originally ex-

pended. It certainly would if we were to apply present day values.

In addition to payment of the physical properties, I believe the condemnee should receive a reasonable amount to represent going concern value because the condemnor did take and the condemnee did lose a going railroad. Physical properties in and of itself do not make a railroad (see *Matter of City of New York (Fifth Avenue Coach)*, 46 Misc. 2d 14, aff'd 23 A.D. 2d 463; modified and aff'd 18 N. Y. 2d 212). Special Term did add 10% of its valuation to cover going concern value but I think the matter should be sent back for additional testimony to either support that figure of 10% or for the substitution of some other amount as may be indicated by the testimony.

I would allow interest at 6% with respect to that portion of the property located in New Jersey. New York limits interest at 4% in a proceeding of this kind, but there is no such limitation in New Jersey. In the circumstances, and considering the present day money market, I think 6% would be more appropriate and more equitable than 4%.

In arriving at my conclusion I have accepted and depended upon, to a large extent, the excellent and carefully considered opinion of Special Term. I concur wholeheartedly in the findings made. They are thoroughly supported by the evidence presented. I appreciate the Court's statement that "[n]o one can hope to find here the factors necessary for reaching some degree of mathematical exactitude in the ascertainment of just compensation." Nevertheless, I do believe that the higher amount representing the original cost furnishes a more sound basis for arriving at an equitable and just result.

Accordingly, I would modify the judgment to award to the petitioner the sum of $61,874,440.01, together with

interest at the rate of 4% for that portion of the property located in New York, and 6% for the portion located in New Jersey. In addition, I would remand the case for further testimony to determine and award to the petitioner an amount representing going concern value.

CAPPOZZOLI, J. (dissenting in part):

I agree with the reasoning contained in the dissenting opinion of Mr. Justice Rabin herein, but I do not, however, believe that a remand of the case for further testimony with reference to going concern value is necessary in view of the voluminous record already made by the parties.

The important and basic finding by Special Term that the "Hudson Tubes is a vital, essential and indispensable trans-Hudson commuter railway facility" is amply supported by the record. No one contradicts this finding. In fact, PATH agrees that if this railroad were to cease operations, the remaining trans-Hudson vehicular facilities would not be able to handle the passenger load. The expert, Burpee, testifying for PATH, expressed the opinion that Hudson & Manhattan should be liquidated and, yet, he did say that the railroad "has utility as an absolutely essential public service".

How can we then speak of scrap value or liquidating value? This is not something which is of no further use. We can only speak of scrapping and liquidating when the enterprise has ceased to be of any service or need to anyone. But this is not so in the case at bar. One can readily visualize the reaction of the passengers and the public authorities if it were announced that the railroad was being discontinued. The simple fact is that no one has come forward with any suggestion of any substitute facility which could take its place and the record is completely silent on this subject.

I am mindful, of course, of the rule that "the question is what has the owner lost, not what has the taker gained". (*Boston Chamber of Commerce* v. *Boston,* cited in majority opinion.) But we are dealing with a most unusual situation. As Special Term said: "in the exceptional circumstances in this condemnation case, as conventional formulas are inappropriate they must yield". *In Boon Co.* v. *Paterson,* 98 U. S. 403, at 408, the Court said:

> "So many and varied are the circumstances to be taken into account in determining the value or property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisements in all cases. Exceptional circumstances will modify the most carefully guarded rule; * * *".

Years later this same court, in *U. S.* v. *Chandler-Dunbar Co.,* 229 U. S. 53, approved the above quotation and also stated, at p. 77, as follows:

> "Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose."

It can be readily agreed that if this existing facility were to be discontinued the public authorities, both of New Jersey and New York, would be hard put to provide substitute facilities. The truth is that they would have to continue the existing railroad even though they would have to dip into the public treasury to pay therefor. For, as was said by the Court in *Fifth Avenue Coach Lines,* 18 N. Y. 2d 212, at p. 218:

> "However laudable the political motivation is in depriving claimants of their transportation system, they must be fully compensated therefor".

And giving to this claimant scrap or liquidation value is not full compensation.

The majority also takes the position that, because the railroad is incapable of profitable operation, the allowance by Special Term for going concern value was unwarranted. I do not agree. The Court of Appeals, in *Fifth Avenue Coach Lines, supra,* at p. 223 said:

> "The argument made by the respondent that going concern value should not be allowed where the court found an inadequate plant, dwindling profits and poor future prospects was made long ago and rejected (citing authority)".

I believe the amount awarded by Special Term, after its very thorough and painstaking consideration of this complex problem, is fair and equitable and fulfills the constitutional requirement of just compensation for what was taken.

I therefore vote to affirm.

APPENDIX C

Justice Loreto's Opinion of December 10, 1965

In the Matter of PORT AUTHORITY TRANS-HUDSON CORPORATION, Relative to Acquiring Title to Real Property in the State of New York and the State of New Jersey for Hudson Tubes Purposes.

CHARLES A. LORETO, J. This condemnation proceeding has been initiated by petition and order of this court vesting title in petitioner Port Authority Trans-Hudson Corporation (PATH), a wholly owned subsidiary of the Port of New York Authority (Port Authority).

The 53 damage parcels are located in the States of New York and New Jersey. They include the interstate rapid transit electric railway owned by Hudson Rapid Tubes Corporation (HRT), which operates between terminals at 33rd Street and Cortlandt Street in Manhattan and terminals in Hoboken and Jersey City, New Jersey, with through service to Newark, and the land with two 22-story office buildings at 30 and 50 Church Street, Manhattan, owned by Hudson and Manhattan Corporation (H&M).

Damage Parcels 1 through 4 are respectively the land with two 22-story office buildings and annexes and the two interconnecting bridges located at 30 and 50 Church Street. Damage Parcels 5 through 53 consist of all the properties in both States owned and used by the claimants for railroad purposes prior to condemnation. Leaseholds, fixtures, easements and other rights, claims and charges also are involved.

The proceeding was instituted pursuant to statutes enacted by the Legislatures of New York (L. 1962, ch. 209) and New Jersey (L. 1962, ch. 8), which granted jurisdiction over it to the Supreme Court of the State of New York, New York County, and provide that the property in each State shall be valued in accordance with the laws of that State.

On September 1, 1962, title to these properties vested in the petitioner pursuant to court order. The trial, involving their valuation, has required the presentation of extensive testimony and much documentary evidence over the course of many months.

Prior to the title vesting date both the railroad system and the buildings 30 Church Street and 50 Church Street were owned and operated under the name of Hudson & Manhattan Railroad Company. Because it had been operating at a loss over a number of years and was unable to meet the interest due on the funded debt, an involuntary petition under chapter 10 of the Bankruptcy Law (U. S. Code, tit. 11, ch. 10) was filed by three of its bondholders on December 14, 1954. The District Court appointed Herman T. Stichman trustee for the debtor, authorizing him to carry on its business.

On December 31, 1961, the reorganization was terminated under a plan whereby H&M has continued its corporate existence under the new name. It continues to own and operate the realty—as of January 1, 1962, the property at 30 and 50 Church Street. Its subsidiary, Hudson Rapid Tubes Corporation (HRT) took over the ownership and operation of the railroad.

Therefore, necessarily treated as separate legal units and considered as separate economic units, proof on valuation was received at the trial separately for properties of the railway and the property of the realty corporations. However, this condemnation proceeding is and remains one and insofar as the evidence is interrelated, it will be so considered in the over-all analysis of the proceeding.

The Property at 30 and 50 Church Street

This realty will be considered first. On behalf of petitioners two realty appraisal experts testified, S. Edwin Kazdin and William Morris. And as such, on behalf of claimants, Paul T. O'Keefe and William MacRossie,

testified. All of them presented adequate qualifications and declared their familiarity with the subject buildings and downtown New York real estate. The appraisals of Kazdin and Morris have but minimal differences. And the appraisals of O'Keefe and MacRossie also do not substantially differ.

At the outset, it will be desirable and helpful to take a look at how the experts generally arrived at their valuation figures. Since MacRossie's appraisal does not significantly differ from O'Keefe's, nor Morris' from Kazdin's, it will be sufficient for illustration and further analysis to focus upon the appraisals of O'Keefe and Kazdin, who incidentally were more deeply examined during the trial.

Conceptus of O'Keefe's (Claimants') Appraisal.

O'Keefe appraises this property at $23,000,000. (It might be well to note here that MacRossie's valuation is $23,500,000.) O'Keefe's valuation is predicated upon a rehabilitation of the buildings, which in his opinion would be "consistent with the highest and best use of the property." He believes that its maximum income potential could be realized only with complete rehabilitation of a character similar to the treatment of the Federal Government rented space. To an estimated cost of $6,500,000 for completing the rehabilitation program, he adds $3,000,000 for estimated loss of rent during three years that it would take to do the work.

In his appraisal, he uses an applied rent for office space on whole floor basis of $4,879,000, takes the actual rent for the stores and miscellaneous of $247,928.99, and a slightly higher rent than the actual for the railway terminal to be based on the anticipated real estate tax, to wit, $217,000—giving a total rental of $5,705,428.99.

In arriving at these rentals, O'Keefe uses a 5% vacancy rate for office space and the same rate for stores.

From the gross income, he deducts: (1) operating expenses of $1,718,000 having considered actual operating charges and estimates by engineers in his firm; (2) $285,271 for vacancies and bad debts, and $855,000 estimated real estate taxes on a projected assessment of $19,000,000.

This would leave a net income of $2,847,158, which he capitalizes at 8¾%, arriving at a figure of $32,500,000. From this figure, he deducts the $6,500,000 to be spent for rehabilitation and $3,000,000 for loss of income during rehabilitation, resulting in a value of $23,000,000 for the properties.

He arrives at a land valuation of $8,600,000, using an over-all per-square-foot rate of $100. Of the net income, he states $516,000 is attributable to the land, capitalized at 6%, and that the balance of the income, to wit, $2,300,000, can be attributed to the buildings.

Considerations which in his opinion favor complete rehabilitation are both external and internal. External proof of success in such modernization he finds in a large number of downtown office buildings. Internal evidence of its desirability and practicality, he finds in the expenditure by the trustee in the years between 1957 and 1962 of more than $6,000,000 in the modernization of the buildings. In his opinion, an investor would incur a greater risk in undertaking partial rehabilitation rather than complete rehabilitation because if he did only the former, the difficulties encountered by the trustee with partial modernization would be continued. Also, he believes that the 37% vacancy of the buildings is a plus and very favorable factor for carrying out his program.

Conceptus of Kazdin's (PATH) *Appraisal.*

Kazdin's first appraisal gives a valuation of $13,200,000 for the property and his supplemental appraisal, $14,500,000. (It may be well here to note Morris' first appraisal is $12,540,000 and his supplemental, $13,795,000.) The latter

is premised upon the assumption of the operation of the railroad. Both Kazdin's and Morris' appraisals are based on partial rehabilitation of the buildings, i.e., of the public corridors and only vacant office space.

Kazdin contemplates an expenditure of $2,750,000 for such rehabilitation. In his opinion, it would not be good judgment for a prospective buyer to contemplate spending $6,500,000 except on negotiated leases.

He arrives at total rentals of $4,008,000, using actual rentals for the stores and office space and an assigned rental for the vacant office space to be rehabilitated.

He uses $1,884,000 as potential operating costs after renovations and rehabilitation with 90% occupancy of office space and 95% occupancy of stores. He justifies his figure for operating costs, having considered the buildings' actual operating costs and his firm's experience. He uses $644,000 for real estate taxes, using assessed valuation of 1962-1963 of $15,111,000. These two expense items add up to $2,528,000, which deducted from estimated total effective income of $4,008,000, leave $1,148,000 as estimated net income.

Using a 9% capitalization rate to the net income figure he gets a valuation of $16,444,000 (rounded) for the property. From this figure, he deducts a total of $3,300,000, which he divides into $2,750,000 for rehabilitation and $515,000 for losses to reflect the development of the tenancies to 90% occupancy by the third and final year of modernization. This leaves a figure of $13,114,000, which Kazdin rounded out to $13,200,000 as his valuation for land and buildings.

In arriving at land value, he uses the unit lot approach and arrives at a land value of $3,963,000 for 30 Church Street and $2,055,000 for 50 Church Street, or a total of $6,018,000. Therefore, the net applicable to buildings would be $7,200,000.

Kazdin's appraisal with railroad operating gives a value of $14,520,000 for the property. It differs from the first appraisal in three respects: (1) the income is increased by

$133,000; (2) the operating expenses are increased by $54,000; and (3) the deduction for rehabilitation and adjustments for time and tenant development is $500,000 less.

The Continuance of the Railroad should be Considered a Factor in the Valuation of the Buildings.

Since PATH has submitted two appraisals by each of its experts, it becomes necessary at the very start to determine which of them should be considered. The principal appraisals of Morris and Kazdin assume the H&M would cease operating. Shortly before the commencement of trial they prepared "supplemental" appraisals of the properties with the railroad in operation. The latter are substantially higher than the former.

Claimants' appraisals are premised upon the continued operation of the railroad.

Inquiry was made as to why PATH's witnesses prepared their first appraisals with that assumption. The court need not speculate as to how or why it came about. For the court concludes at the threshold of this proceeding that the only premise for its consideration and determination of just compensation of the land and buildings requires the reflection of the continuance of the railway and its presence in the subsurface of the property.

The belief, if seriously entertained by anyone, that the railroad would be abandoned and dismantled upon condemnation, defies stark necessity and clear reality. There were legislative findings that passenger transportation is "vital and essential to the economic well-being of the northern New Jersey-New York Metropolitan Area" and that rail services "are and will remain of extreme importance to such transportation". The evidence reveals the heavy reliance by New Jersey commuters on the Hudson Tubes to get to Lower Manhattan business district. For instance, of its 31,560,058 paying passengers in 1961, 95% of them were interstate. Also the charts submitted show

for its average weekday passenger volume in 1961, 40% of the total used it during the peak morning hours. There is no doubt that the vehicular facilities, bridges and tunnels, would be insufficient and incapable of handling, especially during the work-a-day week, the trans-Hudson passenger traffic. The following chart illustrates for all the trans-Hudson transportation the relative decrease in auto passenger use during peak hours and the corresponding increase in the use of mass transportation facilities:

TRANS-HUDSON TRANSPORTATION: PASSENGERS BY MODE OF TRANSPORTATION
(1961—the last full year before condemnation)

	Annual Two-Way		*Eastboun Peak-Hou*	
Hudson Tubes	30,162,000	(10%)	22,234	(24
Pennsylvania RR	13,677,000	(5%)	5,430	(6
Ferries (CNJ and EL)	10,264,000	(4%)	11,373	(12
Lincoln Tunnel buses	65,742,000	(23%)	29,922	(32
Holland Tunnel buses	2,237,000	(1%)	870	(1
George Washington Bridge buses	17,016,000	(6%)	7,957	(9
Automobiles	146,633,000	(51%)	14,574	(16
Total	285,731,000	(100%)	92,360	(100

The above chart shows also that Hudson Tubes carries during peak hours one fourth of all trans-Hudson riders. The inevitable increase in population in northern New Jersey and available employment opportunities in lower Manhattan for New Jersey residents will undoubtedly put the Hudson Tubes to continued use and probably to greater use, especially with some modernization of the railway, particularly as a journey to work facility.

The court finds that the Hudson Tubes is a vital, essential and indispensable trans-Hudson commuter railway

facility. This fact has been declared by every responsible public official of both States who has had an interest in the subject of interurban commuter traffic. No one ever uttered an intimation that the Public Service Commission would suffer it to cease operating because of its financial difficulties. It has been in operation for half a century and was in operation on condemnation date, operating satisfactorily in safe and sound condition at speed and spacing between trains equal to the performance of New York City subways.

Although its operations had not for a number of years been financially profitable, it continued to render essential service. It was not defunct. In the court's opinion, neither the affected public nor the responsible authorities would permit it to cease operating. The notion of its abandonment, surrender of its Hudson Terminal and junking of all its facilities, including the four tunnels under the Hudson River, in view of all the facts, approaches an impermissible dream. For the cost of replacing them, up-to-date and fully modernized, then perhaps not giving greater service, would be the overpowering deterrent to a realization of such a prospect.

Therefore, the only appraisals, in all fairness, the court should consider, are those premised upon a continuance of the railroad's operation.

Rehabilitation of the Buildings would be Feasible, Practical and Warranted.

PATH's attorneys contend that claimants have "spun a web of tenuous assumptions tied to 'hypothetical buildings' which have no evidentiary support". Also they urge that claimants' valuation is predicated on projected rehabilitation of the buildings, a "theoretical" undertaking, such as they say has been rejected in condemnation cases by the courts. Among other decisions they cite *Levin* v. *State of New York* (13 N. Y. 2d 87) and *United States* v.

25.406 Acres of Land (172 F. 2d 990). Those decisions are distinguishable. The *Levin* case rejected capitalization of income from *nonexistent* structures on *unimproved* land, and *United States* v. *25.406 Acres of Land* also is a case where "The property owners have sought to recover a valuation based on the capitalization of income of *nonexistent* apartments" (p. 995; italics supplied).

Here, we deal with *existing* buildings—buildings for which the trustee in recent years expended over $6,000,000 to rehabilitate—a rehabilitation undertaken in large areas of the buildings during the reorganization, which was then considered and determined to be necessary. At that time, O'Keefe expressed approval of the limited rehabilitation undertaken by the trustee. He believes his opinion was then right although he thinks the decision and approval for rehabilitation did not go far enough. It was ineffectual, in his opinion, to give the buildings the surge for increased tenancy that they would have gained, had the trustee been empowered to undertake complete rehabilitation.

It is sheer nonsense to speak of a rehabilitation proposal for 30 and 50 Church Street as "hypothetical" or "new" buildings, or to label them, as such, either because another $6,000,000 is proposed by claimants' experts for their further and complete rehabilitation or another $2,800,000 as projected by PATH's experts for their further and partial rehabilitation.

What is here involved is a question of fact. That is whether feasibility and practicality permit the consideration of only partial additional rehabilitation or of more complete rehabilitation. Therefore, the question of further rehabilitation is one of the degree to which it probably and prudently would be undertaken.

Partial Rehabilitation would be Feasible, Practical and Prudent.

The conception of the necessity, practicality and desirability to rehabilitate these buildings is not one of recent

origin with the claimants as suggested by PATH's attorneys. It is something envisioned as necessary even at the beginning of the reorganization. For the trustee stated in his final report that the buildings had a reasonably profitable operation in 1954 but that they were threatened with disaster unless rehabilitated and modernized to compete with new buildings.

Moreover, Kazdin, PATH's expert, not only approved past rehabilitation, but in addition favored additional rehabilitation. In his appraisal report, under a "Program of Rehabilitation" Kazdin states: "The program of rehabilitation undertaken by the ownership was essential in order to stop the vacating of tenants, make the buildings competitive in the rental market and attract new tenancies. In my judgment, this program should be completed in order to increase the income and protect the value of the property. The vacant areas should be rehabilitated or renovated in varying degrees, giving consideration to the economic feasibility for doing such work. This would require consideration of the location of the vacant space and the potential rentals that might be obtained. I inspected the areas that had been renovated and rented and reviewed the cost of the work that was done. In estimating the cost of necessary rehabilitation, I considered the record of expenditures in the property itself and made comparisons with the modernization that was done in other buildings. In my opinion, a minimum expenditure of $2,750,000 is required in order to complete this work."

PATH's attorneys in their trial reply brief declare: "At most, the space which had deteriorated through vacancy could, in its highest and best use, be restored to tenantability and an estimate of rental potential based thereupon be made. This was the undeniable thesis of petitioner's witnesses Morris and Kazdin and the only sound basis for estimating value in the premises."

All the experts would seek the highest and best use for the property. The fundamental difference in their

appraisals and valuations is that petitioners would predicate their appraisals on rehabilitation of vacant office space only and claimants would include also occupied office space still unrehabilitated.

Kazdin testified that "the highest value is developed by bringing the property into a competitive condition with investment of substantial funds for the rehabilitation and modernization". This the trustee had attempted in incurring an expenditure of more than $6,000,000 for improvements, including new elevators, new electrical rises, provision for central air conditioning in 30 Church Street and rehabilitation of approximately 395,000 square feet of office space.

O'Keefe, while agreeing with Kazdin in this observation, and commending the trustee for his efforts in modernizing as far as he did, believes the problem of bringing the buildings into full competitive position required complete rehabilitation of the properties.

The court finds that what was already actually done in these buildings reflects inherent proof of the practicality and reality of their extensive rehabilitation.[1] This conclusion is buttressed by external proof, which is found in the fact that 66 older office buildings in lower Manhattan with a total of 16,000,000 square feet of office space have been given the "new building" treatment. A strikingly similar building where this was successfully done is that at 17 Battery Place, designed by the same architect and constructed about the same time as 30 and 50 Church Street buildings.

The citation of and quotation from *Salzberg* v. *State of New York* (24 A D 2d 664, 665 [3d Dept., 1965]) to the effect: "the theory of potential use (for which, in truth, the property was physically inadequate and incap-

1. See *New York Times*—Real Estate Section, November 21, 1965 "Many of City's New Buildings Are Just Old Ones Redressed."

able) was supported by no evidence of any substance and rested solely on conjecture" is inapplicable to the facts found here. This is not a situation as is claimed of hypothetical buildings with projected renovations "so conjectural and speculative as to be worthy of no weight whatever". Clearly, in the court's view, a proposal of rehabilitation at least to the extent proffered by PATH's experts would be feasible, practical and prudent to undertake. The question as to whether the program should include the occupied nonrehabilitated office space may well be deferred for later consideration.

Valuation to be Based upon Capitalization of Income.

When title was taken in condemnation, the two office buildings and their annexes, Damage Parcels 1 through 4, were income-producing. The submitted appraisals of both parties are not in disagreement about the principle of law to be applied. Valuation of such property should be based upon the capitalization of income. This is the applicable law.

The basic question presented and the one as to which there is wide disagreement is what net income figure is to be used for capitalization.

There is presented by the opposing appraisals a multitude of questions of fact to resolve. The more significant ones arise because the experts of the parties premise their conclusions principally on differences in their projections of anticipated rentals, vacancy percentages and estimated operating costs. Of course, variances in any or all of these ingredients of the appraisals lead to wide differences in their final estimated figures. These items will be examined separately and thoroughly.

The Actual Rents do not Represent Fair Rents on September 1, 1962

PATH's experts testified that income actually received on vesting date should be the criterion with some modest

augment for limited prospective modernization, whereas claimants' experts testified that actual income must be viewed as low and abnormal because of historical and extraneous factors and that the court should consider the reasonably anticipated income which would result from prudent investment in complete modernization.

Kazdin reports "Eliminating the government space, the average rental for the space rented in the buildings is $4.02 a sq. ft."; further, "The rental value of the vacant space was estimated on the assumption that the space would be renovated and improved in order to meet competition and attract tenants."

He estimated normal occupancy for this building would mean 90% of the total area which could be reached within a period of three years, and he assigns an average rent of $4.07 per square foot for 30 Church and $4.09 per square foot for 50 Church for all space rehabilitated and not rehabilitated.

In his original report—excluding the railroad, estimating alternate uses and income for the concourse, track level and basement areas occupied by it, Kazdin ascribes a total rental value of $225,000 for that space. In his supplemental report, he ascribes $395,000 for it. With this income difference of $170,000, his valuation of the property with its income capitalized at 9%, then is increased by $1,300,000 over his appraisal which excluded railroad operation and therefore this valuation is given at $14,500,000. Morris' supplemental appraisal is likewise increased by almost the same amount, to wit, $1,255,000.

Morris ascribes a potential rent for office space to 30 Church of $2,171,500 and its annex, $196,750 and to 50 Church, $1,391,800 and its annex, $32,500—for a total of $3,792,550.

For basement, mezzanine and stores, he computes $632,700 rent. With this added, the total rent he would give to Damage Parcels 1, 2, 3 and 4 is $4,425,000.

Although in his appraisal report he does not spell out how he arrived at these figures, in his testimony at the trial, he stated he used actual rent paid for all occupied space whether rehabilitated or not rehabilitated and for vacant space to be modernized he assigned a rent of $3.50 to $4.25, depending on the type of space and location.

Morris believes that the actual rents represent fair rents and that the Government lease made early in 1962 represents the highest rent obtainable for the space under normal market conditions.

These views were opposed by claimants' experts and ardently assailed by their counsel. They illustrated discrepancies in Morris' purported meticulous assignment of rent, which did not bear favorable scrutiny. For instance, for 30 Church—sixth floor, he assigned $4.19, and for its seventh floor, $4.54. When asked to explain the reason for the difference, he failed in the court's opinion to show that the absence of air conditioning could be the proper basis of distinction. Too, in some instances, it was demonstrated that the rent he assigned to space with his purported treatment was less than the actual rent paid for comparable space.

Kazdin used the actual rent paid for all occupied space which he considered fair, notwithstanding a large number of tenancies were statutory or of short-lease duration. And he did not believe the bankruptcy of the building had any adverse effect on normal leasing negotiations, nor did he attribute any significance to the threat of condemnation. These views Morris, too, entertained. Claimants, to the contrary, attribute vacancies and poor, abnormally low rents to these conditions.

For vacant space to be rehabilitated as he proposed, Kazdin assigned rental considering floor, size and exposure and used an average of $4.09 for 50 Church and $4.07 for 30 Church on an as-divided basis, attaining for this space a rent of $1,444,059. The average rent was

$4.14 per square foot actually paid as he testified for all space occupied in both buildings, which includes rehabilitated space and approximately 175,000 square feet which had no rehabilitation and some additional space (72,000 square feet) which merely had been "refurbished" and not air-conditioned. As this includes an electricity service charge of 32 cents for the Government space only, the average over-all rent therefor was $4.08 per square foot.

On behalf of claimants, William Capen of Brown, Wheelock, Harris & Vought expressed the opinion that rehabilitated office space in 30 and 50 Church Street would command a rent of $4.50 to $5 per square foot on a whole floor basis without electricity. With electricity, in his opinion, it would be 25 cents higher.

And William Stecknicky, an officer of 17 Battery Place (admitting that Federal space at 30 and 50 Church is better in some respects), testified that, rehabilitated with 97½% occupancy, the average rental in his building is $4.50 per square foot and all rehabilitated usable space for the entire building is $4.50 per square foot.

Before condemnation date and as of January 1, 1962, these buildings became free of prior handicaps and restrictions. The actual rents that had been in effect up to that time should not be equated with fair rents. Even the Federal occupied space represents a bargain to the Government—short-term leases and low rent and in a way, a "God-send" because of the special circumstances. The court believes the rents were depressed and abnormal, the result of transitory events—bankruptcy of the owner, rumors and threat of condemnation—factors definitely militating against obtaining better rentals. Under those circumstances, the buildings were not in a competitive condition and position to bargain for and to secure fair open-market rentals.

Once freed of those shackling conditions, they were capable of entering the rental market on competitive terms.

It may be said that then their future prospects became brighter. And then there could be no reason to deny the buildings' increased rentals which could be derived from improvements that a prospective purchaser could feasibly and prudently make.

Therefore, the court finds that actual rents obtained prior to January 1, 1962 do not represent fair rentals and are not proper to use for this valuation. Its findings of fair rent to be used for this valuation are given in the final analysis under "Court's Findings" for the realty.

Consideration of the Projected Vacancy Rate.

Petitioner's attorneys describe the vacant office space as greatly deteriorated and "slum-like"—the buildings "second class". The only relevant purpose the court can divine for this description is that of implying the requirement of an enormous amount of money in order to achieve an improvement such as envisioned by claimants' experts. The condition of those areas has been described by O'Keefe as poor. The court having viewed the buildings, finds the vacant office areas generally poor and bad where ripped apart and the occupied unrehabilitated offices merely antiquated in that they lack modern or up-to-date improvements. A multitude of photographs were offered by petitioner tending to portray wretched conditions in such areas. However, the court is satisfied that as a whole they represent distortions and exaggerations, especially of the factual condition of light.

In any event, the fact is that for their appraisals the experts on both sides contemplated a renovation of all the vacant spaces, including corridors—the claimants' experts going farther in that they would additionally renovate the occupied unrehabilitated office areas.

Kazdin testified "given time and money the buildings would achieve normal occupancy". He would advise a purchaser to spend $2,750,000 for their rehabilitation. He testi-

fied, "They had not had, in my view, an occupancy which was normal when measured by ownership who invest money and want to protect their investments." Entertaining the same view, O'Keefe expressed the opinion such ownership wisely would carry the improvements throughout the buildings.

Such rehabilitation would completely take care of all such negative conditions. Therefore, the question as to how bad conditions of all those areas were on September 1, 1962 is covered by the appraisal experts and may well be left there.

The parties are in agreement in ascribing a 5% vacancy for the store space and all space other than office. However, as to office space, PATH's experts apply a 10% vacancy rate; whereas, claimants apply a 5% rate and both attempt to sustain their conclusion by referring to surveys and statistics, as well as their own experience and judgment.

Kazdin chooses the 10% vacancy prospect, believing 30 and 50 Church are in the City Hall business district for which such a vacancy rate is shown and also because between 1957 and 1962 of all the new competitive office buildings erected in Manhattan, 35% of them with 11,000,000 square feet of space are in the downtown area and three or four of them are near these buildings. Too, he points to 250 Broadway completed in 1962, with rentals averaging $4.75 per square foot, which, one year later had a vacancy of 20%.

An interesting fact to be noted in regard to the projection of PATH's experts of 90% occupancy and retaining the tenants in occupancy (with the total occupancy of 63% as of September 1, 1962) is that of the vacant space to be rehabilitated then only 65% need be rented to reach the overall 90% occupancy anticipated by these witnesses.

O'Keefe expressed the opinion that 30 and 50 Church are adjacent to the financial and insurance district, that they are not in the City Hall office and loft district, which in 1957 showed a 3.3% vacancy, and in 1962 a 12.5%

vacancy for office space. He would allow a 5% vacancy rate for the office space because the buildings would be made competitive with new buildings and enjoy a normal market for its modernized space. He points to their exceptional location and the fact that even during the bankruptcy period from 1954 to 1957, their office vacancy was but 4%; and that it was because of the bankruptcy when leases then began to expire that tenants moved out to 100 Church Street (completed in 1958) and to other new buildings. Then it became, he says, virtually impossible to rent space even though brokers did whatever was possible to canvas prospects, because elevator modernization proposed several years earlier, was not started until 1961. Further, he testified during the progress of this work, the mess created and the great inconveniences to tenants and guests caused added deterrents to renting. Moreover, it was too late because condemnation had been rumored and soon became official. The court believes these causes created the vacancies and prevented normal renting of office space in these buildings.

Too, claimants call attention to the Whitehall Building to the south at 17 Battery Place and the Woolworth Building to the north, both modernized in recent years, enjoying 95%. William Zucker, vice-president of the Downtown Business Association, William Durstein of William White & Company, and Arthur Sweeney, III, assistant vice-president of Braislin, Porter and Wheelock, Inc., gave such testimony. One William Steknicky, executive vice-president of the Whitehall Building at 17 Battery Place, the building remarkably similar to 30 and 50 Church, described its rehabilitation and its occupancy as of January, 1965, to be 97½%.

The witness John Capen, a real estate broker and first vice-president of Brown, Wheelock, Harris & Vought, which has specialized in downtown leasing during the past 40 years, also testified as to occupancy rate of rehabilitated buildings. He named several old buildings of the same vintage as 30 and 50 Church—25 Broad Street, 17 Battery

Place, 11 Broadway, 15 Broadway, 26 Broadway (in the shipping district); 1 Broadway, 120 Broadway (in the financial district); and the Woolworth Building, 233 Broadway (in the City Hall district); all of which underwent a pattern of rehabilitation, as here proposed, with new elevators, air conditioning (package or complete), acoustical ceilings, recessed fluorescent lighting, modernization of corridors, floor covering and venetian blinds. He testified that these buildings in the past five years maintained an occupancy rate of 90 to 95% and higher.

The layout of these buildings, both 22 stories high, with wings and no setbacks as required under zoning regulations for new structures, affords large open areas with unusual fenestration for large space users which, together with the fact that they border the financial and insurance districts and have the benefit of mass transportation not equalled in any buildings in downtown Manhattan, admits the finding of a higher percent office space prospective rental in those than found in the loft and City Hall districts. Of course, when modernized.

Even in 1957 O'Keefe entertained a view about the buildings not unlike his present one, for he then testified in the reorganization proceeding: "I think the buildings have certain remarkably fine features. In other words, the buildings are in good structural condition. The defects in the buildings are mechanical. The floor layout is excellent. With modernization, you, for future tenants, give them space that would be more attractive than the space to be found in the new building"[2].

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2. O'Keefe explained this 1958 figure of value. He testified that when he gave a value for these properties of $16,000,000 to to the trustee in May, 1958 he did not base it on any specific rehabilitation, only on the basis that a buyer would spend about $3,300,000 in some undefined rehabilitation. That that figure was based on actual income not on projected income after rehabilitation. Moreover, he states $6,142,771 had been put on the buildings prior to 1962.

Considering all relevant factors, the court does not believe a vacancy rate of 10% would be justified after modernization; nor would one of 5%. It is of the opinion that upon modernization, the buildings more likely would not suffer a vacancy percentage in excess of 8%.

Consideration of Projected Operating Expenses:

In view of the differences and contrasts as to all other items by the parties, it would have been too much to have expected anything but substantial disparities in their estimates of operating expenses. On behalf of claimants, O'Keefe and MacRossie give respectively as their estimates $1,718,000 and $1,615,450, for their estimates of projected operating expenses, both assuming 95% occupancy. In their first appraisals for PATH, Kazdin and Morris give respectively as their estimates $1,884,000 and $2,000,000, assuming 90% occupancy, and in their supplemental appraisals with the same occupancy, they give as their estimates of operating expenses respectively $1,938,000 and $2,060,500. The increase of $54,000 and $60,000 over their prior estimates were not detailed nor explained.

In 1961, the actual operating expenses were just short of $1,400,000 with 67% occupancy.

In its Appendix C set forth on page A-5 of its main trial brief, PATH does not tabulate its experts' estimated expenses side by side with those of the opposing experts. It might have been helpful to the court. Even if they were similarly broken down and set side by side, the task of determining which more likely is accurate, would still remain difficult. However, exaggerations and duplications become evident on close scrutiny, and as a result, it becomes possible to determine which presentation is closer to the acceptable.

In the same Appendix PATH lists what it would want treated as "1961 actual" (at 50.6% occupancy) operating expenses, from which it deduces the cost to be $3.10 per

square foot of occupied space. This is not helpful. Rather it is misleading and not accurate. For, although the occupancy rate was 50.6% on November 20, 1961, it was greater during the early months of 1961, and as high as 76.1% on February 20, 1961, thereby showing 231,425 more square feet of occupancy than on November 20. This demonstrates that the actual per-square-foot operating cost was much lower than that PATH would lead the court to believe.

An example of duplication is found in general building repairs. Kazdin and Morris respectively assign for this item $145,000 and $115,000, whereas O'Keefe's estimate is $90,000 and MacRossie's $100,000. The buildings' actual average for it over the preceding five years was $81,275. Kazdin admitted that his figure included some masons and carpenters, who came under his building payroll column. If their wages were withdrawn from general building repairs, then Kazdin's estimate would be about the same as O'Keefe's for this item.

Not overlooking the figures given by the other appraisers, the court will examine (for comparative purposes) the figures of O'Keefe and Kazdin (those of Kazdin in his original appraisal, the only place where they are detailed). Taking first what is by far the largest combined item, payroll and cleaning, for this we find O'Keefe assigns $795,000 and Kazdin $910,000. Morris' is even higher at $990,000. O'Keefe's estimate for electricity is $350,000 and Kazdin's $375,000. For repairs for maintenance, however, O'Keefe's figure ($90,000) is lower than Kazdin's ($110,000) by $20,000. For painting and decorating, the difference is slight—O'Keefe gives $70,000 and Kazadin $75,000. But for tenant changes there is a substantial difference. O'Keefe assigns $60,000 and Kazdin $100,000.

These are the more significant categories showing the variances, which result in making Kazdin's total estimate for operating expenses higher than O'Keefe's by $166,000

or $210,000 if the higher figure in his nonitemized supplemental appraisal is used.

Morris' estimate of operating expenses is exaggerated. He has no breakdown for his payroll figure. For painting and decorating and for altering tenants' premises, he gives an estimate of $295,000. This in contrast to Kazdin's of $175,000; and O'Keefe's $130,000—divided, $70,000 for painting and decorating, and $60,000 for altering tenants' premises. The actual and historical charges for these combined items from 1957-1961 was $77,000 annually. Morris' estimate clearly exceeds the actual expenditure by more than $200,000. How he attempts to account for it, is remarkable and unacceptable. Although great expenditures already had been made for modernization and over $1,000,000 in the Government space alone, Morris' figure includes estimates for tenant changes, which would involve a ripping out and replacing some of that modernization, such as, hung ceilings, fluorescent lighting and partitioning. He testified "You have to destroy practically everything and the cost actually becomes greater than if the installation were not in". This is a viewpoint the court cannot share.

Not all the operating expenses increase proportionately to occupancy increase. For example, elevator maintenance and general building repairs would rise somewhat but not in proportion to occupancy increase, when the latter does not become overly large and might be in the range of 20 to 25%. Cleaning and electricity would definitely increase substantially with occupancy, although not necessarily proportionately.

The court has considered the fact that claimants' appraisers' testimony regarding operating expenses was supported by the engineers in their offices who are the specialists in the field. PATH's appraisers, concededly not qualified as experts in the area of operating expenses, stated they relied on information obtained from men in

their offices who were not produced to testify and supplement their testimony.

After painstaking and thorough consideration of the evidence pertaining to projected operating expenses, the court will accept for its use in seeking to attain a fair valuation the higher of claimants' estimates and apply it to the occupancy per cent it is of the opinion is more probable and would be fair. This is the sum of $1,718,000, to which will be added $75,000 as reserve for contingencies already mentioned.

Allocation of Value to the Land.

As the land and buildings at 30 and 50 Church Street are one, in that they constitute a single economic unit, they should be valued as such. And since the property is income-producing, valuation is to be based on a calculation of return on investment. An allocation of value separately for the land serves as a check on the over-all valuation.

PATH's witnesses used the "unit lot" approach and claimants' witnesses the square-foot method in calculating value for the land. Although the former may appear to be more meticulous and exact, in that it purports to estimate value of individual unit lots of 25 by 100 feet, determining their number, adding percentage increments for corners and plottage, it is not a realistic approach for this particular land valuation.

The land area with which we are concerned of more than 86,000 square feet embraces most of two large city blocks in the lower Manhattan business district. This is patently not comparable to a lot 25 by 100 feet, containing 2,500 square feet. No one has pointed to any land area of any substantial size, certainly not of the same size, in that location suitable and available for office building. To assemble such a plot would require the extraordinary feat of procuring by purchase 34 contiguous unit lots or

an unspecified number of larger contiguous units in a comparable location. The court believes the scarcity of available land in the downtown district would make the assembling of such a plot not only difficult but virtually impossible.[3]

Another important factor distinguishing the land here from the usual plot of land is the fact that there is a railroad terminal under its surface, producing an income of approximately $755,000 yearly—truly something of a rarity. This is an important factor justifying an increment in the over-all valuation of the land.

These distinctive features make this land particularly unsuitable for the "unit lot" valuation approach.

Nor does the court find the sales submitted by PATH's experts, Morris and Kazdin, comparable. The deed transfer of 30 and 50 Church Street to H&M on consummation of the reorganization was not a sale in the ordinary course of business. Moreover, no purchase price was paid. Sales 4 through 11 and 13 through 15 listed by PATH involve properties less than 1/10 the size of 30 Church and much less than the combined plottage of 30 and 50 Church. There is no close resemblance in size. Sale 12 located on West Street is under the West Side elevated structure. It clearly is not located in the same or adjoining street or within the same business center.

"When property, on the same or an adjoining street, is described as bearing a close resemblance, or nearly corresponding, to the one in question as to improvements, size, location, general adaptability, and within the same business center, it may be said to be similarly situated" (*Penn.*

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3. Not considered as evidentiary in this proceeding. But illustrative of the effect of scarcity of land on prices in Mid-Manhattan—which would be the same, in lower Manhattan, see *Wall Street Journal*—October 22, 1965, "Joint Venture By Land under New York Building"; and *New York Herald Tribune*, November 19, 1965, p. 23—"Another Park Ave. Skyscraper".

Co. for Insurances on Lives, etc. v. *Philadelphia,* 268 Pa. 559, 563-564; also 1 Orgel, Valuation under Eminent Domain, §§ 136-138). By these tests, none of the listed sales relied upon by PATH are particularly significant as similarly situated and comparable.

And sale 3 of the land on which the building at 100 Church Street was built, which Kazdin admitted was less valuable than 30 and 50 Church, having been made in June, 1958, more than four years before the condemnation date, was not clearly made "within a reasonable time of the vesting of title" in this proceeding (L. 1947, ch. 819, § 1, subd. [1], par. 1). Although somewhat comparable, it is not the same size nor as favorably located and too it lacks the in-built transit facilities and special subsurface income of 30 and 50 Church.

Reference is made to a valuation of $5,200,000 for this land by O'Keefe in a 1957 report. This he explained to have been too low, that land values in the next five years increased approximately 25%, and he further justifies his present appraisal because of the scarcity of plottage, making it almost impossible to duplicate a plot this size for office building.

Moreover, claimants' experts, O'Keefe and MacRossie, declared that as a practical matter land is never bought and sold on a unit lot-value basis. Therefore, considering its size, location, transit facilities, street frontages and unique railroad terminal site, they adopted an over-all per-square-foot value of $100, giving it a total land valuation of $8,650,000. The court finds and assigns an over-all square-foot value of $85 to the land.

Observations About Other Items.

(a) *The lack of probative value in the book entries of the parties.*

The book entry figures of the parties are of no evidentiary help. PATH points to the book entry in the final

account of the trustee stating $10,800,000 for buildings and $2,290,107 for land. Claimants point to three journal entries of the corporation of January, 1962, showing $5,300,000 for land, $11,787,154 for buildings and $3,668,507 for construction. Also claimants point to a report to stockholders in 1962 stating the balance sheet for their books shows $5,200,000 for land and $15,484,000 for buildings.

The court is unable to ascribe to these book entries any probative force in its determination of just compensation. They are completely unsubstantiated by any proof as to the method and means whereby the figures were obtained. It is not helpful in this proceeding to assert that at one time or another, the trustee or the claimants made such entries in their books of lower or higher figures as the property's worth.

(b) *PATH's claim that large expenditures for work additional to that found in its appraisals should be considered.*

PATH called four of its employees to give testimony of what they would consider to be additional and necessary work for the buildings—for instance, fire towers $701,500; removal of ornamental masonry $206,100; new roofing $191,000; steam cleaning $168,000; masonry painting $84,500; window caulking $17,100 and venetian blinds $30,200—totalling $1,400,200. In addition, they testified to additional elevators, freight and passenger $770,000 and additional electrical equipment $184,000. The grand total of all these items as given by these witnesses is $2,355,100.

There are several objections to the acceptability and validity of this proof. First, PATH's appraisers, Kazdin and Morris, having carefully examined the buildings, never mentioned as necessary or included any of these items in arriving at their valuation. For example, in their appraisals they assumed 90% occupancy, and nowhere mentioned the need for additional elevators or additional

electrical equipment. Another large item mentioned by these witnesses—fire towers—has never been found or reported by the Building Department of the city to be necessary, nor has it been included in the appraisals of PATH's experts. These items do not merit consideration in this proceeding. Regarding the item pertaining to ornamental masonry, PATH's witness chiseled away the cornice to expose a piece of corroded metal. Upon that finding, it concluded that all the stone ornamental coping should be removed. Perhaps it should.

To the extent it becomes necessary with the passing of time to repair or replace any exterior defect or to make interior repairs, these can be met, as O'Keefe testified, out of an ample reserve or contingency fund set aside for such needs. The court is led to believe that these additional building costs, which the court believes to be largely exaggerated, were presented by PATH's witnesses not qualified as experts of construction costs, in a final effort to negate practically all value for the buildings. If the court applied value for the land and the figure advanced for these costs were deducted from Morris' or Kazdin's total valuation, their net value for the buildings would be absurdly low.

This testimony will be given the probative value it deserves in estimating a reserve or contingency fund in determining fair valuation in this proceeding, and for this purpose the court adds, to the operating expenses it approves, the additional sum of $75,000.

(c) *Startling facts about PATH's valuations.*

Morris' building value (for both buildings) is $7,055,000. This is without having made any deduction for vacancy losses during his proposed rehabilitation. Even without such a warranted allowance, this ascribed value is but $900,000 more than the total amount spent by the trustee for rehabilitation during the six years preceding condem-

nation. And before the trustee spent $6,100,000 for the improvement of the buildings they were assessed at $8,550,000 (years 1957-1959).

These observations serve as a check, broadly showing that Morris' valuation cannot be accepted as accurate and fair. Kazdin's building valuation is not much better.

PATH's witnesses Morris and Kazdin, respectively, give as fair total valuation for land and buildings at 30 and 50 Church Street $12,540,000 and $13,200,000, in their original appraisals, and figures in their supplemental appraisals of $13,795,000 and $14,500,000 respectively, which are below the assessed valuation of $15,100,000 placed on the land and buildings for each of the three years preceding condemnation. Claimants point out that downward variations from assessed valuations are contrary to actualities, especially as to sales of office buildings in Manhattan. They demonstrate that 41 commercial office buildings were sold in Manhattan during 1962 for an aggregate sales price of $69,314,950, when they had a total assessed valuation of $45,153,000. These figures illustrate that the aggregate sales price represents 153.5% of the assessed valuation of those buildings, whereas Morris' and Kazdin's appraisal valuations represent but 83% and 87% of the assessed valuation. If what is found to be the usual and normal ratio between assessed valuation and current open-market sales of similar buildings is used as a check in valuation, it would confirm the belief that PATH's witnesses are far from the mark in what they ascribe as fair valuation for just compensation to these properties.

Motions to Strike Testimony.

Decision was reserved on several motions made by PATH's attorneys to strike certain testimony.

(1) Objection to Spaet's report on the ground that it relates to an "improvement" within the meaning of sub-

division (m) of section 1 of chapter 819 of the Laws of 1947 as to which 30 days' notice prior to trial need be, but was not given. As the court reads and understands the word "improvement" to be used in the statute, it relates to and means anything in the nature of a structure built on previously vacant land. The relevant portion of the act reads: "no map or plan of proposed streets, drains or sewers for the subdivision and improvement of any property * * * nor any oral or written estimate of the cost of making such excavation or filling or piling or of constructing any such other proposed structure or improvement * * * shall be received in evidence".

The word "structure" in the quoted portion of the act, preceding the words "or improvement", tends to define the word "improvement" to mean something similar. To hold that it embraces a rehabilitation of an existing structure would be a strained and unwarranted extension of the legislative meaning of the word.

(2) PATH's motion to strike O'Keefe's testimony as to operating expenses because it was shown that he relied on the analysis of Mr. Beeman. Edward Guilford, Chief Engineer of Charles F. Noyes Company, responsible for all engineering in buildings managed by his firm, and who shares responsibility with O'Keefe in estimating such costs, and William Dinerstein, of the operating department of Wm. A. White & Sons, who had examined the buildings, were produced and testified as to reasonableness of the projected expenses under assumed conditions. Therefore, the court believes the objection goes to the weight of the testimony rather than to the admissibility.

(3) PATH's attorneys also moved to strike Steknicky's testimony on the ground that it contravenes subdivision (l) of section 1 of chapter 819 of the Laws of 1947, which refers to "rent reserved or other terms in any lease". He was not asked any question as to any lease terms or rent reserved as to which prior notice is required. He testified

to the average rent on whole-floor basis paid at 17 Battery Place after rehabilitation. This information might be comparable to similar general information acquired by a real estate expert who would use it in expressing an opinion. The court does not believe it contravened the statute because prior notice had not been given.

Accordingly, these motions to strike, on which decision was reserved, are denied.

The Problem of Vacating Tenants in Occupancy for the Proposed Total Rehabilitation.

In addition to arguments already covered, PATH contends that complete rehabilitation as contemplated by claimants is unrealistic and speculative (1) because of the improbability or impossibility of clearing occupied unrehabilitated space to carry on the work; and (2) because it would not be realistic or feasible to undertake it without tenant commitments and foreknowledge of what they would want.

PATH's attorneys emphasize the fact there would be 260 tenants with space on different floors, as to whom it is no answer to say their removal would be a matter of negotiation.

Undoubtedly, it might prove to be a difficult undertaking, if not formidable, but not necessarily insoluble or impossible. O'Keefe would provide a substantial sum of money to be used in the negotiations. He points out that this type of obstacle has been confronted before in similar undertakings and overcome. He testified that one would proceed with the general contracting like air conditioning and for subdivision of the actual space and partitioning and would wait for the tenants. He expressed the opinion that for the small tenants it would be a matter of trading, dealing and negotiation. Of the 260 existing tenancies, 68 were statutory or month to month, 10 would

expire in 1962, 65 in 1963, 44 in 1964, and 56 in 1965. Only 17 would remain beyond the three years allowed for rehabilitation. Of these 11 occupied space partially rehabilitated, and the remaining six occupied but 6,200 square feet, less than 1% of the total office space of both buildings. To expedite their removal O'Keefe would lay aside the sum of $600,000. Specially preparing space for a tenant, O'Keefe states, would be at an added cost to the prospective tenant.

PATH's appraisers would not advise complete rehabilitation under one program. Beyond the vacant space rehabilitation, they would propose that negotiations with prospective tenants be first had. Such was the manner in which the work proceeded for the Whitehall Building at 17 Battery Place. This undoubtedly is the more cautious approach, and the one the court accepts.

The court believes that in view of the nature and extent of O'Keefe's professional involvement in lower Manhattan real estate, his close, personal and intimate knowledge of nearly all the large buildings in the area and his vast experience in connection with transactions relating to sale and tenancy of those buildings, he is exceptionally equipped to express a judgment regarding the financing and tenanting a project such as here proposed by him.

But the court is impressed by the aggregate of potentially unfavorable factors to the anticipated net income after rehabilitation as he envisions for these buildings. Principally, they are—the difficulties and expense posed in removing present occupants and delay in accomplishing this so that their space might be renovated in conjunction with other or larger areas; the indefiniteness or uncertainty in obtaining many whole-floor tenants for 10-year leases; and the problem of securing financing above the purchase price for the cost of the renovation.

These pose real drawbacks to the acceptance of the opinion of claimant's experts as to income potential based on complete rehabilitation. The court believes that these opinions are born of high optimism, presenting the rosiest and most hopeful results. It may be possible and even probable to attain what O'Keefe honestly believes. But the court believes there is more optimism than reasonable probability to assure its fulfillment.

Conclusion (30 and 50 Church Street).

After careful and thorough consideration of all the evidence, the court finds plausible and acceptable factors in the opposing appraisals, already alluded to and discernible in the analysis set forth below for ready reference and for comparison with the court's figures and findings, which it is duty bound to state, however, keenly aware that these too are "speculative" although "set down with delusive exactness" (*Louisville* v. *Cumberland Tel. & Tel. Co.*, 225 U. S. 430, 436, per Mr. Justice HOLMES).

CLAIMANT'S APPRAISAL (BY O'KEEFE)

ESTIMATED INCOME & EXPENSES		
Rental Income		
Offices No. 30 Church St. (applied rates)		$ 2,947,000.00
Offices No. 50 Church St. (applied rates)		1,932,000.00
(based upon complete rehabilitation of all office space vacant and occupied, not yet rehabilitated)		
Stores No. 30 Church St.		231,427.72
Stores No. 50 Church St.		129,862.15
Concourse		188,780.04
Store Rooms		7,757.00
Union News (Lobbies and Concourse)		31,102.08
Hudson Rapid Tubes (Subsurface Rental applied)		217,500.00
Miscellaneous Revenue		20,000.00
Total		$ 5,705,428.99
GROSS ANNUAL RENTAL	$5,705,429.00	
Less: Allowance for Vacancies and Bad Debts—5%	285,271.00	$ 5,420,158.00
OPERATING EXPENSES		1,718,000.00
AVAILABLE BEFORE TAXES		$ 3,702,158.00
Taxes (Assumed Assessment $19,000,000)		855,000.00
NET INCOME IMPUTABLE TO PREMISES		$ 2,847,158.00
Capitalized at 8¼%		$32,500,000.00
DEDUCT: Cost of rehabilitation and loss of income during rehabilitation	$3,000,000.00	
Rehabilitation cost	6,500,000.00	$ 9,500,000.00
Appraised Value		$23,000,000.00
Applied to land at $100 per sq. ft.	$8,600,000.00	

Justice Loreto's Opinion of December 10, 1965

PATH'S APPRAISAL (BY KAZDIN)

ESTIMATED INCOME & EXPENSES		
Office Rental Income (Actual)		$ 2,375,908.00
Estimated Rental—Vacancies 353,974 sq. ft.		1,444,059.00
Represents:		
Applied rent for all vacant office space to be rehabilitated according to his program.		
For 30 Church and annex = 187,179 sq. ft. at 4.07 sq. ft.		
For 50 Church and annex = 166,795 sq. ft. at 4.09 sq. ft.		
TOTAL OFFICE RENTALS		$ 3,819,967.00
	say,	$ 3,820,000.00
LESS: Reserve for Vacancies and Losses—10%		382,000.00
EFFECTIVE OFFICE RENTALS		$ 3,438,000.00
Store Rentals (Est.)	$ 375,000.00	
LESS: Reserve for Vacancies and Losses—5%	19,000.00	
EFFECTIVE STORE RENTALS		356,000.00
Other Income:		
Concourse Stores	$ 178,000.00	
Railroad Facilities	177,000.00	
Newsstand, Storage, etc.	40,000.00	
TOTAL	$ 395,000.00	
LESS: Reserve for Vacancies and Losses	48,000.00	
EFFECTIVE OTHER RENTALS		347,000.00
		$ 4,141,000.00
TOTAL ESTIMATED RENTAL INCOME		$ 4,141,000.00
LESS: Operating Expenses	$1,938,000.00	
Real Estate Taxes	644,000.00	
TOTAL EXPENSES		2,582,000.00
TOTAL NET INCOME		$ 1,559,000.00
Capitalized at 9%		$17,322,000.00
	say,	$17,300,000.00
DEDUCT: Cost of rehabilitation and adjustments for time and tenant-development		2,800,000.00
FAIR MARKET VALUE		$14,500,000.00

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COURT'S FINDINGS

Office Rental Income (Actual)			$ 2,376,000.00
Of Vacant Office Space (to be rehabilitated according to PATH [KAZDIN'S] proposal)			
30 Church St.			
147,467 sq. ft. at 4.30 =	$634,108.00		
Annex			
39,712 sq. ft. at 4.10 =	162,819.00		
		$ 796,927.00	
50 Church St.			
157,919 sq. ft. at 4.25 =	$671,155.00		
Annex			
8,876 sq. ft. at 4.05 =	35,947.00		
		$ 707,102.00	
			$ 1,504,029.00
Office Rental—Total			$ 3,880,029.00
LESS: Contingency Reserve (Vacancies and Losses)—8%			$ 310,402.00
EFFECTIVE OFFICE RENTALS			$ 3,569,627.00
Store Rentals	$375,000.00		
Less 5% for Vacancies and Losses	18,750.00		
EFFECTIVE STORE RENTALS		$ 356,250.00	
Other Income:			
Concourse	$178,000.00		
Railroad	177,000.00		
Newsstand, Storage, etc.	40,000.00		
	$395,000.00		
Less 5% for Vacancies and Losses	19,750.00		
EFFECTIVE OTHER RENTALS		$ 375,250.00	
TOTAL OF STORE AND OTHER RENTALS			$ 731,500.00
TOTAL ESTIMATED RENTAL INCOME			$ 4,301,127.00
LESS: Operating Expenses	$1,793,000.00		
($75,000 in excess of O'Keefe's figure)			
Real Estate Taxes ... ($15,111,000—1962-1963 Valuation)	650,000.00		
			$ 2,443,000.00
			$ 1,858,127.00
Capitalized at 9%			$20,645,000.00
DEDUCT: Costs of rehabilitation and adjustments for time and tenant-development			$ 2,800,000.00
The court's finding of fair valuation of land and buildings at 30 and 50 Church Street			$17,845,000.00

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THE RAILROAD

A Profile of the Hudson Tubes.

At the time of condemnation, the Hudson Tubes Railroad operated over eight and a half miles of double-track main line (all but three fifths of a mile owned by HRT), which is laid, for all but three fifths of a mile, in subaqueous and subterranean tunnels between two terminals in Manhattan—one at 33rd Street and Sixth Avenue and the other directly under the Hudson Terminal buildings (30 and 50 Church Street)—and two terminals in New Jersey—one in Hoboken and the other at Journal Square in Jersey City.

Two of the services had their New York terminus at Hudson Terminal and utilized the railroad's two single-track tubes extending approximately 6,600 feet under the Hudson River between Hudson Terminal in New York and Exchange Place in Jersey City. One of these downtown services continues from Exchange Place to Journal Square, with an intermediate stop at Grove Street; the other continues to Hoboken, with an intermediate stop at Pavonia Avenue.

The two uptown services, also running to Journal Square and Hoboken, respectively, commence in New York at 33rd Street and Sixth Avenue, and thence extend—with stops at 23rd, 14th, 9th, and Christopher Streets—through the two single-track tunnels to New Jersey.

A fifth service, operated by HRT, runs between Hudson Terminal and Journal Square, and thence over the Pennsylvania Railroad's tracks to Harrison and Newark, New Jersey.

The tunnels through which the trains operate extend more than 70,000 feet in both New York and New Jersey and under the Hudson River. The tunnels were constructed for the greater part of their length by driving shields under compressed air through the silt, rock and mixed face under the Hudson River and then installing

a lining of cast-iron rings bolted in place. The subaqueous tunnel sections are of the single-track design.

In addition to the shield-driven cast-iron line segments, which extend approximately 42,600 feet, there are considerable lengths of single-track and double-track tunnels which were constructed by regular rock tunneling and mining methods. Caissons were sunk from the surface to house the switch enlargements in Hoboken and to permit construction of the tracks leading into and out of Hudson Terminal.

Except for Journal Square, all of the stations on the railroad are integral parts of the tunnel system and were hewn out of the same material.

History of Construction.

The construction of the railroad, originally with the plan for one tunnel and two tracks, was commenced in 1874. In 1879, the plan was changed to provide two separate tunnels, each with two tracks to accommodate single-unit trolley cars between New Jersey and New York. Work not having progressed far out of the Jersey shore, a blow-out occurred in 1880, resulting in the loss of the lives of 20 workmen. A shut-down continued for one year, followed by sporadic work until 1891, when again construction halted, this time because of financial difficulties. Work was resumed in 1902 on the two uptown tunnels, when permission was granted for the construction of two tunnels for the downtown line between Jersey City and Fulton Street in New York City. The connection of all lines was completed in 1909.

A Statement of the Valuation Contentions.

Basically because the railroad has not been operating profitably, and would not in the foreseeable future, PATH's experts declared that in their opinion its only value is in

liquidation or as "junk" and that in this condemnation such value would be approximately $1,000,000. Also they declared that this appraisal is confirmed by their "securities valuation" approach in evaluating the securities of the railroad.

The railroad ownership offered uncontroverted expert evidence showing the reproduction cost of the railroad to exceed $500,000,000, and its original actual cost over half a century ago to have been some $62,000,000. Its attorneys correctly urge that the concept of "just compensation" cannot be reduced to a formula and is not the subject of mathematical precision but is the result of "substantial justice" struck from "an equitable balance". Agreeing that the deficit operation of the railroad would not in fairness permit an award of reproduction cost, its attorneys also contend that an award of the original cost in fairness and equity would not be compensatory. They tender a suggestion of taking the average of the lowest reproduction estimate less depreciation and the original cost, halving this amount, and thereby fixing $127,400,000 as an award for the railroad to represent a fair result to both condemnor and condemnee.

Both parties are aghast and unbelieving of the other's contention and proposed valuation. Truly, they not only have struck polar positions but approaches that if analogized to goods and metals are neither fungible nor fusible.

The problems here raised are perplexing; the factual situation is unusual. The task of the court, functioning without a jury, in striving to make a just determination in this proceeding, is indeed far from a light one.

In order to fully appreciate the problems posed, one should first become acquainted with the physical plant of the railroad (the court has made the statutory viewing) and have some knowledge of its origin, history and operation to condemnation date.

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The Extent of the Railroad Operations.

The railroad operated on September 1, 1962, as it still does, between two terminals in New Jersey, one in Hoboken and the other at Journal Square, and two terminals in New York, one under the Hudson Terminal Buildings at 30 and 50 Church Street and the other at 33rd Street and Sixth Avenue.

There are 8½ miles of double-track main lines (all but 3/5 of a mile in subaqueous and subterranean tunnels). The four tunnels under the Hudson River through which the trains run extend 70,000 feet.

There are four services operated seven days every week on a 24-hour schedule.

Of two downtown services with terminus at Hudson Terminal, one extends to Exchange Place in Jersey City, with a stop at Grove Street, and continues to Journal Square; the other continues to Hoboken, with a stop at Pavonia Avenue.

The two uptown services from 33rd Street and Sixth Avenue, New York, with stops at 23rd, 14th, 9th and Christopher Streets, run also through two single-track tunnels and extend to Journal Square and Hoboken, respectively.

There is a fifth service, known as "joint service", operating between Hudson Terminal and Journal Square over the Pennsylvania Railroad tracks to Harrison and Newark. HRT received 40% of the fares and bore 40% of the operating expenses of this service, which utilized 50 air-conditioned cars bought four years before condemnation, 20 of them purchased by HRT for $1,637,000.

Electricity for the operation of the entire system, purchased from Consolidated Edison, was converted from AC to DC current for traction power at three of its substations, located at Hudson Terminal, Christopher Street, and Jersey City.

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An automatic block signal system, with tripper devices along tracks and at junction points, was being replaced and unified under a control panel at Hudson Terminal. There were repair shops and car yards at Harrison Street in Jersey City and a shop for track and station repairs at Hoboken.

Incidentally there were rights of way, stations, station entrances, ventilation lines held under franchises, easements or licenses.

Additional Historical Operational Facts.

What the actual original cost of the construction of the railroad was, the engineering firm of Ford, Bacon & Davis reconstructed from an exhaustive search for and analysis of original records. They found it to be $62,000,000. However, the corporate capitalization of the railroad considerably exceeded that figure. Its financial structure involved a fixed interest indebtedness of more than $72 million and capital stock with a par value in excess of $45 million.

This inflated capital structure remained as a financial dead-weight around the railroad's neck until its reorganization in 1954, despite the fact that during the intervening years it enjoyed peak passenger traffic. This rose from 52 million in 1912 to 91 million in 1920 and to 113 million in 1927. Through those years, the railroad repurchased some of its refunding bonds in the open market. This practice was resumed between 1934 to 1945, when property amortization funds and discount amortization funds were principally used. In the twenties, it was able to meet the bond interest obligations and pay dividends on its stock.

In the thirties, there was a decline in passenger traffic, which saw a resurgence during the war, reaching the high of 83 million in 1943. Since that date there has been a decline to 41 million in 1952.

Fare increases from 10¢ to 15¢ for the interstate lines and from 5¢ to 10¢ for the New York intrastate line were

granted in 1950. Nonetheless, the railroad was not operating profitably. And unable to avoid a default on its refunding bonds, several bondholders filed a petition for its reorganization in 1954.

As of January 1, 1962, it was freed of the bankruptcy proceeding. The decree of the Federal District Court authorized the severance of the realty from the railroad, as has already been noted in the discussion of the realty phase of this condemnation.

The Hudson Tubes is a Vital, Essential and Indispensable Trans-Hudson Rail Commuter Facility.

Claimants do not foresee any further decline in the Hudson Tubes passenger load; on the contrary, they would expect an improvement.

In 1961, the Hudson Tubes carried 31,500,000 paying passengers, 95% of whom were interstate riders. These riders were divided between downtown and uptown Hudson Tube lines during several years prior to 1962 in the ratio of 3 to 2, with traffic about equal for both lines during peak hours. The Hudson Tubes passengers during peak hours represent 40% of its average week-day volume. It is definitely a commuter line and serves a vital role as a journey-to-work trans-Hudson facility—the Tubes carry approximately one fourth of all trans-Hudson riders during peak hours. (See chart *supra.*)

PATH's witness, Roger Gilman, director of Port Development, attributes the prior decline in passenger traffic to shifting of employment opportunities from Manhattan to New Jersey, five-day work week, the usage of automobiles for pleasure, decline in population in certain parts of northern Jersey served by the Tubes, the development of suburban shopping centers, the usage of bus to travel into and out of Manhattan.

Gilman added—"Basic, also, to this decline is what has taken place affecting rail transit and commuter rail serv-

ices in all parts of the region and throughout the United States."

A survey made by the Harvard Graduate School of Public Administration for the Regional Plan Association indicates that job opportunities in Manhattan will increase while its population will decrease between 1960 and 1985. Claimants call attention to what is known as the "Aldene Plan", a proposal of the Railroad Transportation Division of the New Jersey State Highway Department, for rerouting mainline trains of the Jersey Central over the Lehigh and Pennsylvania Railroad tracks to Newark. PATH estimated in 1961 that the "Aldene Plan" would add 4,800,000 passengers to the joint services.

Also claimants show that whereas Lincoln Tunnel suffers congestion and delays during peak hours, none have been encountered in the Hudson Tubes, and PATH acknowledges that "if the Hudson Tubes were to cease operations, trans-Hudson vehicular facilities would be incapable of handling the passenger load."

All these facts, in the court's opinion, tend to the conclusion that the railroad will continue to have at least approximately the same level of passenger traffic as in 1961, with the distinct probability of an increase over the course of years.

On all the evidence, the court finds that the Hudson Tubes is an essential railroad facility in the trans-Hudson transportation; that passenger transportation is "vital and essential to the preservation of the economic well-being of the northern New Jersey-New York Metropolitan area" and that rail services "are and will remain of extreme importance to such transportation".

What we are concerned with is a railroad that has been serving as an indispensable passenger-transportation link between New Jersey and lower New York for over half a century. The natural and beautiful barrier of the Hudson River, due to the increase in population and the advent

of the automobile, has made necessary the supplementary links of two vehicular tunnels and the George Washington Bridge. The Hudson Tubes have safely and continuously been operating since 1910 to condemnation date and since then to the present time.

It is impossible to conceal or escape from the fact that this railroad was taken in condemnation as an operating railroad to be continued, as it has been, by the condemnor for the very same purpose and use in its same integrity and with its same components and facilities.

The Railroad should be Valued as of September 1, 1962.

The court's sole responsibility in this proceeding is to evaluate the railroad as of September 1, 1962. Its prior history provides background of interest since the railroad did not appear as out of a vacuum for the first time on that date. And its travail in reorganization provides the conclusive evidence of its financial woes and inability to operate profitably. But it must be remembered that claimants have made no pretense that it is a money-earning enterprise. Its unprofitability is undisputed.

On that fact alone, PATH's experts premise their conclusion that its highest and best value is in liquidation. However, none of them suggested that on September 1, 1962 or thereafter it should be dismantled and discontinued. Nor has any responsible person.

Since there has been frequent reference to the reorganization proceeding and the decision of the Federal courts, it becomes necessary to point out that the Federal court was concerned with something much different than is our concern. Its concern was to determine whether the reorganization plan met the statutory test of being "fair and equitable" in the treatment of the competing claims of creditors and stockholder interests (Bankruptcy Act, § 174; U. S. Code, tit. 11, § 574). And valuation there was limited to statutory purpose of determining "how

much the enterprise in all probability can earn'' (*Group of Investors* v. *Milwaukee R. R. Co.*, 318 U. S. 523, 540 [1943]). ''Valuations for other purposes are not relevant to or helpful in a determination of that issue, except as they may indirectly bear on earning capacity'' (*Consolidated Rock Co.* v. *Du Bois*, 312 U. S. 510, 526 [1941]).

Therefore, the limited scope of the reorganization proceeding and the nature of the Ford, Bacon & Davis Report of 1960 submitted in that proceeding, to which reference has been made by PATH's attorneys in their reply brief, predicated upon a number of speculative factors none of which pertained to the status of the properties on condemnation date, dictated its exclusion in this proceeding.

Consideration of Claimants' Proof for Valuing the Railroad.

The claimants' evidence submitted for consideration is that showing original cost, reproduction cost, and cost trended to September 1, 1962 from original cost. This was done through members of the firm of Ford, Bacon & Davis, consultants in management and engineering with much experience in the transit and transportation field.

In order to show that their figures are as accurate as possible, they testified to extraordinary research, studies and work they employed in reaching their conclusions. Briefly, this should be outlined in order that credence may be given to the accuracy of their findings and estimates.

Lionel S. Baldin, a vice-president of that firm, was in charge of special projects, including any large project requiring the estimation of reproduction cost less depreciation and the original cost trended less depreciation. Baldin, on the subject project, was responsible for planning, procedures, staffing the current job, staff conferences, conferences with the HRT personnel and with the attorneys.

The project was in direct charge of Leroy H. Sickle, senior in charge, who followed the work day to day in great detail.

The estimates of reproduction cost were divided into several parts, each in charge of a group senior. The tunnels, subways and stations, underground stations were given to David Baillie; the track and signal system to G. A. Sargent; the electrical system to E. F. Heath; buildings to R. P. Dee; the rolling stock with some incidental items to J. M. Brown; and a variety of odds and ends such as station appurtenances, turnstiles, shop equipment, and items of that nature, to C. J. Smithson. Land, rights of way and easements were appraised by Paul O'Keefe for those in New York State and by J. Robert Ham for those in New Jersey.

The original cost was analyzed under Sickles' direction. The trending was done by a consultant, H. H. Howland, under Sickles' direction. Baillie, an outside consultant, also worked with W. R. Bradley, a division civil engineer, on planning, procedures and assistance for carrying out the work.

The services of one Cornelius Conner were engaged and he assisted Baillie and his staff on the tunnel work. Conner had been employed by one of the predecessor companies of Hudson Rapid Tubes in 1950 until his retirement in 1956.

During the course of the work, the group seniors consulted with each other to follow the progress and to expedite the progress.

Upwards of 30 persons (engineers, accountants, and statistical analysts) from time to time worked on the project.

Up to the time Baldin first appeared and testified in court, 16,000 man-hours were spent on the project—6,000 on the tunnels, subways and stations; 1,000 on tracks and signal system; 2,000 on the electrical system; 1,000 on buildings; 1,000 on rolling stock and ventilating system, and 500

on miscellaneous chores. The original cost took 3,500 man-hours, and the trending over 500 man-hours.

Because of the size and length of service of the condemned railroad property, the first step they employed was to review available published information as to the methods of construction of the variety of items constituting the property. All available drawings, records and other details were studied and materials taken off the various drawings to develop the qualities, types and kind of material and also the method of construction.

Inspections were made of the various items of the property shown on the drawings; visual information was obtained for use in the reconstruction; visual observations of physical deterioration to determine depreciation percentages and amounts; estimating costs of the various items involved (by obtaining material prices, development of labor requirements—not only in time but in sizing of work gangs); and the restriction of working time and other factors involved. The date certain or target date was September 1, 1962.

With respect to materials, the unit prices were obtained, to which was applied overhead—such as transportation, purchasing, handling and labor. Since a job of this magnitude would require it to be done by contract, there was applied the contractor's overhead and profit.

The engineering costs for the design of the project were estimated by the group seniors. On top of material and engineering costs, there were applied general overheads, the organization and administration of the project as a whole (with its number of design engineers and contractors), the legal expenditures, taxes and interest during construction.

The total of all of the foregoing was the reproduction cost.

With respect to depreciation, physical deterioration was not only visually observed but also records of usage were analyzed and tests performed to help formulate accurate physical condition of the property. Over and above the

physical deterioration, depreciation includes essentially lack of use or utility. If not useful in whole, the item was not included in the reproduction cost estimate; if the item was possessed of only partial use or utility, then the nonuseful portion was excluded from the reproduction cost estimate.

Another element of depreciation is obsolescence—arising mostly from newer, more modern equipment or structures being available, sometimes at lower costs but more often than not at lower operating or labor expense and maintenance expense. Adjustments were made in any item of property which was in part or whole physically deteriorated, nonuseful, or obsolescent.

The result of the foregoing work and research by the firm of Ford, Bacon & Davis, is a presentation of the original cost, reproduction cost, and original cost trended, which in abbreviated statement are as follows:

I

Original cost, less retirements—Total $61,874,440.

Principal Items	
Tunnels—subways	$31,999,802
Communication and distribution system	5,110,423
Stations and structures	3,828,533
Engineering	1,844,465
Rights of way and other land used	1,026,055
Rails	821,037
Signals	1,248,214
Passenger cars	2,421,336
Interest during construction	6,427,931

II

Reproduction costs—Total $488,462,153.

Principal Items	
Tunnels, subways and stations	$424,803,066
Signal system, track and road bed	8,939,927
Electrical equipment	3,984,014
Rolling stock, tunnel ventilation and drainage systems	6,331,560

III

Original cost, trended to September 1, 1962—$447,559,549.

This is the proof which claimants submitted—not disputed for accuracy, although strongly opposed as to its relevancy—for the court to consider in ascertaining just compensation for the railroad.

A Review and Analysis of the Testimony of PATH's Experts Concerning the Railway.

PATH used three witnesses to express an opinion regarding valuation of the railway. They are—George W. Burpee, a professional consulting engineer who has had 60 years' connection with the railroad industry, their construction, analysis and valuations; William Wyler, also a professional engineer with a background of railroad valuation; and Robert E. Field, an accountant with experience in the examination and analysis of financial statements of public utilities.

All three predicated their valuations basically upon the fact that the railroad had not been operating profitably for a number of years and could not in the foreseeable future. Burpee and Wyler expressed the opinion that it had only liquidation value on September 1, 1962. They also testified that this opinion was confirmed for them by their securities valuation of the railroad. Field, having as an accountant examined the railroad's financial structure and earnings, expressed his opinion that it had only salvage value.

Wyler gave his analysis of the market value of the securities of the railroad. He arrived at a net market valuation of $16,997,782. He testified that the securities value approach was used as "confirming" his studies and findings of the company's earnings during the years 1957 to 1961. His conclusion was "This railroad, in my opinion, has a maximum value of the amount that could be realized

from its liquidation". He stated that this is his opinion because the company has no earning power.

Burpee expressed an opinion, based upon his experience and examination of H&M, that its highest and best use was in its liquidation. He qualified this opinion by adding, however, that is not necessarily what should be done with it—that in his opinion it had no commercial value since it was not a money-making private enterprise. Also, he added that it "has utility as an absolutely essential public service".

Burpee testified that the last time he had anything to do with the sale of a rapid transit railway was in 1940 with the Manhattan Railway. Also he stated that he does not know when a transfer of ownership of any kind of rail rapid transit in any city in this country last took place. And he admitted that there is no private market for this rapid transit, certainly not in this area.

He gave a schedule of improvements that he would find necessary for different components of the railroad amounting to 30 million dollars and approximately 2 million for immediate application to deferred maintenance.

The proposed expenditures would be 18 million for 64 new cars bought by PATH in 1964; 3.8 million for silicon rectifiers; 1.9 million for signal systems; 4.3 million for rehabilitation of stations, of which 2.7 million would be for the Hudson Terminal Concourse, ¾ of a million for drainage and ½ million for ventilation.

All of these estimated expenditures were furnished to him by PATH and he stated he agreed with them.

Notwithstanding these proposed expenditures for rehabilitation of those segments of the system (the tunnels will be discussed separately), Burpee testified that as of September 1, 1962, "the physical condition of the stations was this: that they were operable and they were reasonably safe". The improvements were proposed because the public would expect stations of PATH as good as its bus

stations. Continuing: "The track situation was in safe condition. * * * The rails were also in satisfactory condition". Of the 211 black cars, 191 in number were obsolete and ready for retirement; the grey cars, 20 in number, were reasonably new, acquired but four years previously. Of the drainage system, the emergency pumps were not in good condition, although the existing pumps would handle normal seepage; and the ventilation system was wholly inadequate and half of the proposed expenditure would be for "a bladder", a contraption that would be a possibility, of which he does not know its use in any railroad.

"The signal system was in the process of renovation" to silicon rectifiers, which he would install for the rotary converters. He admitted that the Transit System, Long Island Rail Road, and the New York Central Railroad, as well as Consolidated Edison Co., still use rotary converters, with programs in some instances to install silicon rectifiers over a number of years.

Burpee found some fault with the tunnels, their size and curves. This condition, he denotes as obsolescence, and to it he ascribes an inability to use the modern cars of 90 feet in length and 10 feet wide.

Notwithstanding the curves of the Hudson Tubes, he admitted that the system permitted the run of 30 trains per hour, the same number that the curves of the IRT permitted.

For the tunnels, out of the total 32 million proposed expenditure, he had a deferred maintenance item of $82,000. And of the value of the total railway system, the tunnels, in his opinion, represented more than 50%. However, without the railway he declared the tunnels would have no value.

The conclusion the court deduces from Burpee's testimony is that the Hudson Tubes, as a railway system, is essentially a safe one in relatively good condition, operating on schedules comparable to the IRT of New York City, but requiring replacement of obsolete cars and re-

pairs and substitutions in different parts or components of the system. Suggested expenditures for face-lifting of stations and improvements in the signal system, by continued substitution of silicon rectifiers for rotary converters and the like, represent programs of improvement that would be spread over a number of years, even if PATH were to undertake to complete them, and in the court's opinion would add to the value of the railway—an addition to the value, the claimants should not be awarded and which they do not ask.

The court finds that the railway as a physical plant has been and continues to operate regularly and satisfactorily, although it is susceptible to improvements. Only as such, the court should appraise it in searching for just compensation to the owner—not as a railway operating profitably —for it has not and probably would not, while in private ownership, operate profitably.

Virtually conceded is the fact that there exists no market for such a rail rapid transit commuter railway. This has been declared in the past as a judicial finding. (See *Matter of City of New York* [*Sixth Ave. El. R.R.*], 265 App. Div. 200, 207).

The usual approach of ascertaining commercial value or market value, therefore, is wholly inappropriate here. Too, no legal authority has been cited or found wherein a "securities valuation" approach has been considered appropriate for valuation in condemnation of a railway such as this. Nor is the court persuaded to consider the securities valuations submitted by Burpee and Wyler—even though it finds them subject to infirmities in that they are based on a paucity, dearth or absence of market transactions, as "confirmatory", as they stated, of their primary valuation based on absence of profit. However, these opinions offer the court a view of the railway, as might be said, from different windows and different perspectives, which should be considered in making its final decision.

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CONSIDERATION OF APPLICABLE LAW.

The Exceptional Circumstances of This Case do not Permit the Application of any Conventional Legal Formula.

The taking is legal and therefore proper. Having been tested in the courts, it can no longer be questioned. Now the issue is as to the compensation. This must be just and thereby satisfy the Constitution. Both the Constitution of the United States and the Constitutions of the two States wherein the condemned property is located command and guarantee "just compensation". That is the only criterion of an award in eminent domain. For clarification and emendations of its application, one must turn to the court decisions. The compensation awarded must be just both to the owner whose property is taken and to the public that must pay (*United States* v. *Commodities Corp.*, 339 U. S. 121, 123 [1950]).

PATH having taken the position that the railroad has only liquidation value, its attorneys rely heavily on the statement by Mr. Justice HOLMES in *Boston Chamber of Commerce* v. *Boston* (217 U. S. 189, 195): "And the question is what has the owner lost, not what the taker gained" as the inviolate standard of valuation—a statement reiterated in cited decisions, quoting from *Spitzer* v. *Stichman* (278 F. 2d 402, 410) as "The only invariable principle of valuation in condemnation proceedings".

But in a situation, as is here found, in which the taker has gained for use what the owner in the same use has lost, the quoted statement of Mr. Justice HOLMES, loses the poignancy it otherwise would seem to have. And this is so because the Supreme Court has also held and reiterated that it is proper to consider the use for which the property taken is suitable and that it is desired for the same purpose.

Thus, in *Boom Co.* v. *Patterson* (98 U. S. 403, 408 [1878]) the court stated: "So many and varied are the circumstances to be taken into account in determining the

value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

And the Judges of the same court years later in *United States* v. *Chandler-Dunbar Co.* (229 U. S. 53, 76-77 [1913]) approvingly referred to the above quotation taken from the *Boom* case. And in *Chandler-Dunbar,* with respect to the phase of the case before it, the court stated: "The exception taken to the inclusion as an element of value of the availability of these parcels of land for lock and canal purposes must be overruled. That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose. [Citations.]" (*Olson* v. *United States,* 292 U. S. 246, 255; see, also, Bonbright, Valuation of Property [1st ed., 1937], pp. 424, 425.)

Something in the nature of an equipoise is struck when the actual use of the owner is the same as that of the taker. This is the factor lacking in the cases cited by

PATH's attorneys. All distinguishable for this basic reason seem to fall into three categories.

1. Where the function and use of the property as part of the utility expired. Such are *Matter of City of New York (Manhattan Ry. Co.)* (265 N. Y. 170, 172-173 [1934], affd. *sub nom. Roberts* v. *City of New York*, 295 U. S. 264 [1935]) which involved only the disused spur of the Third Avenue elevated structure on 42nd Street; *United States* v. *Toronto Nav. Co.* (338 U. S. 396 [1949]) involving a car ferry of Lake Erie Railway which had lain in dock unused for five years before condemnation and *Market Street Ry Co.* v. *Commission* (324 U. S. 548 [1945]) cited by PATH is a rate-making case, not a condemnation valuation.

2. Cases where value was claimed based on the capacity of the governmental unit to pay. An example is *Onondaga County Water Auth.* v. *New York Water Serv. Corp.* (285 App. Div. 655, 666 [4th Dept., 1955]).

3. Cases where the property was taken for a different use—(not the identical use to which it was put while in the hands of the owner). Examples are *United States* v. *Cors* (337 U. S. 325, 330-334 [1949]) where a commercial tug boat for which enhanced value was sought because of its adaptability to military uses, evoked the warranted rebuke by Mr. Justice DOUGLAS that that would represent "hold-up" value. The tug vessel was requisitioned during war to be used as a steam-heating plant for heating and pumping fuel oil from oil barges into naval combat vessels. There were four dissents to the decision. For the majority, Mr. Justice DOUGLAS wrote directing a reversal in order to have determined the extent of enhancement in market value due to increase in demand caused by the war. *United States* v. *Chandler-Dunbar Co.* (229 U. S. 53, 80 [1913]) which involved a small island with a "strategic value" as a necessary part of a comprehensive system of river improvement. Moreover, there was a market value

for the island, as the court stated: "That the property may have to the public a greater value than its fair market value affords no just criterion for estimating what the owner should receive" (p. 80); *United States* v. *Boston, Cape Cod & N. Y. Canal Co.* (271 F. 877, 893 [C. A. 1st, 1921]) a shipping canal for which greater value was claimed because of its "special and peculiar utility * * * to the government as a taker for purposes of national defense" and *Spitzer* v. *Stichman* (*supra,* cited and quoted from by PATH for this principle—not a condemnation case but the Hudson Tubes reorganization proceeding).

It may seem odd that both parties should charge each other with not having presented at the trial expert evidence of value. If this were so, it indeed would be a strange record, especially since this has been an exhaustively prepared and extensively submitted condemnation proceeding. PATH's attorneys assert that claimants have merely introduced "arithmetical exercises" by experts on reproduction cost and original cost. Claimants' attorneys state that PATH's experts merely gave their personal theories of the legal principle to apply, stating solely their "argumentative legal conclusions" to be drawn from the railroad's financial condition.

However, the court finds that claimants have offered relevant proof for it to take into consideration—evidence both as to original cost and reproduction cost—neither impeached nor contradicted. They ask the court to fix a just and equitable award on all the evidence, including a consideration of unprofitability. PATH, on the other hand, chooses to submit a figure based on conclusions of its experts, hopeful the court will agree with it. Perhaps this is the best the parties could do in seeking to sustain their opposing contentions in view of the unusual situation.

Such the court perceives it to be. The public authority has condemned to take the railroad while still oper-

ating in order to continue it in the same use. It was functioning normally and safely on September 1, 1962, as it had for many years before. It had not been a money-maker and probably would not and could not be while in private ownership. PATH's experts opine that that reduces its highest and best use to liquidation value. "Value is a word of many meanings" (*Southwestern Bell Tel. Co.* v. *Public Serv. Comm.*, 262 U. S. 276, 310 [1923, Mr. Justice BRANDEIS]). The word gathers its meaning in a particular situation from the purpose for which the valuation is being made. See Bonbright, Valuation of Property [1st ed., 1937], pp. 4-6.)

Burpee persisted in his statement that the railway had no "commercial value" because it was unable to operate profitably but he readily conceded it had utility. Too, he admitted that he would not recommend it be dismantled and discontinued. The realism of the latter observation, in the court's view, negates the validity of any opinion expressing liquidation and scrap value. Scrap value, which Wyler testified, would be obtained by dismemberment of the railroad and the separate sale of its components. It strikes the court as unfair and patently contradictory to assign scrap value in one breath and in the next to say the property should not be junked.

Not to be overlooked is the fact that Burpee, at one time, in writing on this subject specified three factors which should "be considered in determining the value of public utility property", i.e., earnings, reproduction costs and actual cost. In this case, he failed to consider the latter two. The court, however, will consider all three.

Reproduction Cost May be Considered.

The court agrees with PATH that reproduction cost is not the formula to use in this case in ascertaining value. The cases where it was used as the sole criterion are inappo-

site. Necessarily, it must appear that there would be a reasonable likelihood of reproducing the same railroad. For a business or public utility, the profitability of the undertaking would be of prime importance. Such is the realistic view taken by the courts. (*See United States* v. *Benning Housing Corp.*, 276 F. 2d 248, 250.)

Recognizing the factors already alluded to rendering this commuting railway, as well as others throughout the country, incapable of operating profitably, claimants have not urged that reproduction cost is the sole standard to apply. However, they offered such proof and it was received as likewise was proof under different theories proffered by petitioners. (*Matter of Board of Water Supply of City of N. Y.*, 277 N. Y. 452, 458.) In the exceptional circumstances of this condemnation case, as conventional formulas are inappropriate, they must yield. (*Banner Milling Co.* v. *State of New York*, 240 N. Y. 533, 546.) Therefore, all available approaches and information helpful and relevant in ascertaining just compensation, should be received for consideration by the court.

PATH's attorneys cite and quote from *Market St. Ry. Co.* v. *Commission* (324 U. S. 548 [1945]), as authority rejecting a consideration of reproduction cost. That case was concerned with the propriety of the fare rate fixed for the San Francisco Transit line by the commission. It was claimed that the rate, failing to take into consideration reproduction cost, constituted an unlawful taking. But "No study of the present cost of reproduction is shown * * * Nor do we think it important" (p. 564). Here a study of reproduction cost is shown. Moreover, in that case a rate of 6 cents was fixed on the price at which the company offered to sell the property to the city and at which it actually did sell to the city after negotiations and before the question was presented to the Supreme Court, for which the issue was preserved.

Although the decision is not applicable to a condemnation proceeding, it does present an observation significantly appropriate to consider here, which is "no responsible person would think of reproducing the present plant, consisting in substantial part of cable cars and obsolete equipment" (p. 564).

The Hudson Tubes on September 1, 1962, had a large number of cars in very poor condition, requiring replacement, and some components of the system that were obsolete. No one testified, or even suggested, that the system would be reproduced along the same lines and with the same kind of equipment, if not taken. Much of it, of course, was usable and has been continued in use—and this is especially true with respect to the tunnels. Claimants, recognizing these facts, do not ask for a valuation based on reproduction, although they submit such an analysis for consideration. For that limited purpose, the court accepts it.

The Hudson Tubes system has a similarity to the *New York City Fifth Ave. Bus* case (discussed *infra*) and the *San Francisco Cable Car* case in that all three are transit systems and companies unable to operate profitably. Beyond these features, there is a marked difference. The Fifth Avenue Coach Company operated buses over public streets and the San Francisco Transit Company operated obsolete cable cars over public streets. The components of the Hudson Tubes principally are four subaqueous trans-Hudson tunnels, subway stations, and other facilities, much different from the former two transit systems. Its tunnels are rather unique. The nature of these component properties as a functioning transit system, already fully described, distinguishes this case—apart from other factors. Reproduction in condemnation valuation was appropriate for the buses, and although reproduction is often a factor in rate cases, the obsolete cable cars and

the special facts of the case permitted the court to hold it was not error to exclude it in rate fixing in that case.

There is no precedent admeasuring the weight which reproduction cost less depreciation and obsolescence should have in a situation as here presented. The concept of utility, unlike the concepts of cost and reproduction cost, is extremely difficult if not impossible to reduce to a quantitative expression. Because of its nature it does not lend itself to mathematical computation. But the court is duty bound nonetheless to render its decision quantitatively in dollars. Therefore, of necessity it is obliged to receive and consider any evidence which will help in attaining a just result. (See *United States* v. *Benning Housing Corp.*, 276 F. 2d 248 [C. A. 5th]; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 125; *Onondaga County Water Auth.* v. *New York Water Serv. Comm.*, 285 App. Div. 655, 661-663.)

In this case, reproduction cost has a legitimate place. It is a part of the entire picture. No one has testified that the major components of this integrated functioning transit system are so obsolete that they must be discarded. Reproduction would not be undertaken because of unprofitability. But continued use is not foresworn. Fairness therefore dictates that reproduction cost be considered as a factor in overruling any theoretical negation of value. And where it is not used as the sole standard, as here, this proof is of further service. It serves to hold in check and to act as a balance to an approach to valuation that would be inequitable in view of the exceptional facts of the case.

Liquidation or Scrap Value is Unwarranted and Impermissible. This Functioning Railroad Must Be Valued As Property in Use.

The Fifth Ave. Bus case is the subject of much contested discussion by the parties in their trial briefs (*Matter of City of New York* [*5th Ave. Coach Lines*], 23 A D

2d 463 [1st Dept., 1965], affg. 46 Misc. 2d 14 [Sup. Ct., 1964]). It is an important decision to consider. The Trial Judge, Mr. Justice WILLIAM C. HECHT, an experienced and highly respected jurist, charted a new pathway in condemnation valuation of a functioning but nonprofitable public utility. He declared (p. 26) the property "must be valued as property in use", and the Appellate Division, in affirming, agreed, stating (p. 466) the bus company's "properties were integrated, and so functioning, they should not be appraised as though unintegrated and dismembered", adding "They are worth something more, although to be sure, not entitled to the same increment of value they would enjoy were they operating profitably or with the capacity for future profitable operation".

These observations of the Appellate Division aptly apply to this railroad. In that case, the Trial Judge applied reproduction cost less depreciation (46 Misc. 2d 14, 33).

The facts of this case require a different approach in ascertaining just compensation. It is not an increment over liquidation value, as PATH's attorneys suggest and interpret the Appellate Division's opinion in the *Fifth Ave.* case to hold. Nor should it be reproduction cost of the component parts, taking into consideration physical and functional depreciation, as well as "going concern" "nonprofitability" factors.

Nor would a security valuation have any validity in "confirming" an opinion expressing liquidation value, when it is attempted to apply it in ascertaining just compensation in a condemnation proceeding (see *Matter of United States Comm.*, 295 F. 950, 954; 1 Bonbright, Valuation of Property [1st ed., 1937], pp. 244-249, 444-446; 2 Orgel,

Valuation under Eminent Domain [2d ed., 1953], § 220, p. 161).[4]

This is not a case where PATH steps into possession of a railway with an ability to earn and in fact earning. If that were so, "It should pay therefor not merely the value of a system which might be made to earn, but that of a system which does earn." (*National Waterworks Co.* v. *Kansas City,* 62 F. 853, 865.)

Since PATH has taken the railroad functioning and in operation, it must be valued as one in use. "Nor can it be doubted that the property must be valued as property in use. It involves a practical contradiction in terms to say that properly useful and actually used in public service is not to be estimated as having the value of property in

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4. There are cases where the market value of securities as established by market transaction, are regarded as important, such as appraisal of shares of dissenting minority stockholders at the time of a change in a corporation's affairs, as when voting rights are limited or abolished. Even then, there must be a free and open market and the volume of transactions make the market a fair reflection of the judgment of the buying and selling public. (See *Matter of Marcus* [*Macy & Co.*], 273 App. Div. 725, 727 [1st Dept., 1948].)

Here, there was insufficient volume of sales to draw any conclusions from, or give consideration to, the transactions or bid and asked quotations in the absence of transactions. In short, the securities valuations made by Wyer and Burpee were devoid of the factual ascertainment and showing of market volume which is necessary to make a meaningful market study.

Also, to be meaningful in a condemnation proceeding, there must be presented proof of total value of *complete ownership* of the company whose property is being condemned. Transactions involving small sales or even small minority interests "do not carry control, and hence their quoted prices are usually determined without reference to the power and prerequisites that would be enjoyed by a sole owner of the business" (1 Bonbright, Valuation of Property [1st ed., 1937], p. 247).

use, but is to be reckoned with on the basis of its 'junk value'." (*Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 191.)

The intangible plus to be accorded in valuing property "in use" should be reflected "in the appraisal of the physical assets as part of an assembled whole." (CARDOZO, J., *Columbus Gas Co.* v. *Commission*, 292 U. S. 398, 411.)

No court decision has been unearthed holding that an operating utility taken in condemnation should have its component parts separately awarded scrap value to which a modern increment for "going concern" value, may be added—a concluding proposal proffered by PATH's attorneys in their trial brief.

"The value in equity and justice must include whatever is contributed by the fact of the connection of the items making a complete and operating plant." (*Omaha* v. *Omaha Water Co.*, 218 U. S. 180, 202.)

Not only is there no market for the railway as a whole, no one has suggested an instance of the sale and purchase as separate units of tunnels under and across the Hudson River extending from lower New York to New Jersey. This is mentioned because Burpee testified to giving salvage value to different components, such as obsolete cars and rails to be sold for whatever metal and parts value they might have and for which there exists a scrap market—and for the tunnels, for which there is no market, he attributed practically no use or value, suggesting that all that could be done with them would be to plug them on a dismemberment of the railway.

When one reflects on what was involved in the construction of these four tunnels, realizing that but the minimal expenditure of $82,000 for minor defects is required and that they can be used with safety into the indefinite future, it is easy to see that Burpee's suggestion is not one that the court can seriously contemplate as a reasonable probability.

Justice Loreto's Opinion of December 10, 1965

Consideration of the Four Trans-Hudson Tunnels.

On behalf of claimants, David G. Baillie, Jr., testified as an expert witness as to reproduction cost of the four tunnels and the subways. He is a civil engineer with vast experience in the construction of tunnels and subways, having participated in the construction of the first tube of the Lincoln Tunnel, the Queens-Midtown Tunnel, and the Brooklyn Battery Tunnel, among others. He testified that there were more than 70,000 feet of tunnels, subways and stations, 42,600 feet of which, for the most part, were erected under the Hudson River by driving shields within which the excavation was made under compressed air.

Also Baillie testified that the rate of progress and the wages paid to gangs working in the shields would depend on the materials through which and the pressure under which the tunnels were driven. And since those materials and pressures vary along the length of the tunnels, it was necessary for him to determine these facts for every foot of shield-driven tunnel, from the sinking of the construction shafts on the shore to the meeting of two shields under the river. He stated that he was able to determine the wages that would be paid to the gangs working in the shield at each point of progress.

Baillie based his estimate on the different kinds of tunnel structure actually in place, with the single exception that he substituted the standard 15 feet and 3 inches inside diameter cast-iron line tubes for limited quantities of brick tunnel and 19 feet and 5 inches outer diameter cast-iron line tubes reinforced with a concrete inner lining, both of which would have been more costly to reproduce. He based his estimate of labor costs on the union scale for sandhogs prevailing in New York and New Jersey on September 1, 1962, when the basic rate for a six-hour day was $41.20. But as the pressure under which work is done increases, the basic rate increases and the number of hours

a sandhog is permitted to work under State and union safety regulations decreases, thus increasing labor costs.

In estimating the reproduction cost of other tunnel structures, such as cut and cover and open cut, Baillie adopted the unit price per foot of construction, basing his estimate on a careful study of actual bids for comparable work, trended by *Engineering News Record* indices, to arrive at 1962 price levels.

Also he separately estimated the engineering cost of the project, including all necessary design and supervision, from preliminary survey and soils investigation, through design of the tunnel to supervision of the actual construction, adding profit, contingencies and general overhead, items which would be part of a contractor's price.

For the four tunnels, he estimated a total reproduction cost of $383,678,198, deducting 10% depreciation of $38,737,856, for a total of $344,940,342. He allowed $40,275,000 for engineering, borings and inspection and overhead, less 10% for depreciation, or total of $36,208,836, which he added to $344,940,342, making a net total of $381,149,178.

This reproduction cost of the tunnels was in no wise assailed. However, PATH contends the tunnels and the entire railway system would not be reproduced by anyone. But the fact remains that the tunnels are being used intact, and the railway system too, with improvements.

Burpee admitted that the tunnels represent more than 50% of the value of the entire system. Of the reproduction costs, less depreciation, given by claimant's experts, the tunnels represent more than 75% of the total.

Burpee would charge them with a degree of obsolescence because they are single-track and because of the curves in the Hudson Terminal. Too, he would recommend the expenditure of approximately $82,000 to rectify some defects.

The court finds that the tunnels are sound and safe and have a utility as such into the distant and indefinite future.

The uncontroverted evidence in the proceeding sustains this finding. They should be considered as the most vital and important component of an operating trans-Hudson commuter rail system.

The tremendous ratio of value of the tunnels to the entire Hudson Tubes system inclusive of all its other components, their fundamental significance and necessity for a trans-Hudson system and their continued use for the same purpose by the taker, the relative permanency of their construction, are important factors, outweighing all others in the court's mind in reaching an evaluation for just compensation.

Therefore, upon consideration of these findings and of the proof of reproduction cost reflecting strength and enrichment to the proof of original cost of the tunnels and subways, the court attributes to them the sum of $30,000,000 in its final analysis.

Conclusion (Railroad)

In this condemnation proceeding, the most often used market value approach to valuation cannot be considered, because of the total absence of a market for the railroad, Liquidation or salvage value because it is incapable of producing a profit is unwarranted and impermissible, for it is an integrated, functioning system. Nor is confirmation of such liquidation valuation by a security analysis relevant proof. Reproduction cost is admissible for consideration. But it may not be used as the criterion for just compensation, because of the nonprofitability of the railroad as a business enterprise. The court turns to original cost, which is buttressed by reproduction cost.[5]

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5. *Stephenson Brick Co.* v. *United States* (110 F. 2d 360 [C. A. 5th]); *Borough of Hanover* v. *Hanover Sewer Co.* (251 Pa. 95); *Matter of Board of Water Supply of New York* (277 N. Y. 452, 458, 459); *New Rochelle Water Co.* v. *State of New York* (9 A D 2d 824 [3d Dept., 1959]).

But the court must observe that nonprofitability serves as a potent check to the application of the latter in any significant measure. In addition, the court must give due consideration to the significant fact that this is an integrated, operating system, whose component parts as an assembled whole should include an indefinable plus of property "in use".

If analogy is found in Newton's experiment with prisms showing that white light is composed of all the colors of the spectrum, each lending its own characteristics to a degree when passed through a prism, all the approaches to valuation entering into the informed mind and sensitive conscience of the court lend to an appropriate degree in the resulting decision.

Thus, in arriving at its ultimate valuation as just compensation of the railroad, the court makes an aggregate award of $800,000 for Damage Parcels No. 5 to No. 52 inclusive, located in New York State and the State of New Jersey (included as rights of way, land, improvements and easements in the original cost exhibit); and as already stated, the court makes an allocation of valuation of $30,000,000 for the tunnels and subways. To these figures, mindful of the proof that the tunnels and subways represent more than 50% of the worth of the entire railroad, the court adds for the remainder an amount it considers fair, equitable and just, treating the railroad as an entire integrated and operating system, to make the sum of $55,000,000 as the total award for the entire railroad.

The court expresses its appreciation to eminent counsel on both sides and their capable assistants, always deporting themselves as gentlemen and as paragons of the legal profession, for their thorough preparation and masterful presentation of the extensive evidence in this exceptional and arduous trial.

Justice Loreto's Opinion of December 10, 1965

As what might be termed an epilogue, it may be appropriate to note a reflection made by the illustrious Mr. Justice FELIX FRANKFURTER in one of his lectures, when he stated: "The core of the difficulty is that there is hardly a question of any real difficulty before the court that does not entail more than one so-called principle * * *. This contest between conflicting principles is not limited to law * * *. But judges cannot leave such contradiction between conflicting 'truths' as 'part of the mystery of things.' They have to adjudicate. If the conflict cannot be resolved, the task of the court is to arrive at an accommodation of the contending claims. This is the core of the difficulties and misunderstandings about the judicial process. This, for any conscientious judge, is the agony of his duty."

The Port Authority Trans-Hudson Corporation is directed to prepare and submit a partial separate tentative decree accordingly.

APPENDIX D

Justice Loreto's Opinion on Objections of Port Authority Trans-Hudson Corporation to the Second Tentative Decree, Dated April 25, 1966

SUPREME COURT

NEW YORK COUNTY—SPECIAL TERM

PART VI (CONDEMNATION)

[SAME TITLE]

LORETO, J.:

The objections of petitioner, Port Authority Trans-Hudson Corporation, to the Second and Last Separate and Partial Tentative Decree of the court filed February 2, 1966, in the above proceeding, with respect to *Damage Parcels 1 Through 53,* are overruled in their entirety.

Essentially the objections raise questions of law which have been fully considered by this court and present questions which petitioner apparently may choose to present to the appellate courts.

With respect to objections numbered 1, 3, 7 and 8, which are directed to the relevancy and weight of the evidence considered in so far as they pertain to the determination of the award for the railroad, the court makes the following observations.

After allocating $30,000,000 for the tunnels and subways, and mindful that they represent more than fifty per cent of the worth of the entire railroad (Burpee's testimony), adding an amount it considered fair and just for the remainder and treating the railroad as an entire integrated and operating system, the court made an award of $55,000,000 for the entire system.

It may be appropriate to state here briefly an approach used as a check for the figure ascribed for the remainder of the railroad excluding tunnels and subways, in arriving at the award for the entire railroad. Recalling the finding

on the evidence that the tunnels and subways represented in value somewhat more than the remainder of the railway, and having ascribed $30,000,000 to the former, the court was left with the task of ascribing a value to the latter merely as components of the railway. For these, plus an amount representing increment for an integrated operating railway—one in use—it assigns a figure of $25,000,000. Taking each item, excluding tunnels and subways, on claimant's Exhibit DD (p. 13) at original cost, which was undisputed, it appears that the total original cost for these items is $29,985,638.* These perhaps hardly need any extension of remarks. But it is difficult to refrain from noting a blindness which refuses to credit the reality of this railroad system as one integrated, vital and in use. Particularly apt is the statement of Mr. Justice Hecht in his opinion in Matter of City of New York (Fifth Avenue Coach), 47 Misc. 2d 334, 737, to the effect: "* * * The plain fact is that the City (here PATH) was able to walk in on the date of condemnation to operate this transit system without interruption, just as it had been operated up to condemnation. * * *"

PATH, having taken a legal position, deliberately chose to ignore the evidence as to original cost. The opinion of the court sets forth its reasons for the justness in considering original cost. It is clear to the court that it would perpetrate a gross injustice, shocking to its conscience, if it were to assign to it, though not profitably operating, but scrap value. Confronted with formidable reproduction estimates (almost ten times the original cost), which could properly not be used as the measure of valuation for reasons stated in its opinion, the court believed they impressively buttressed and fortified the rationale and equity in the use of original cost.

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* See Addendum (Exhibit DD).

Justice Loreto's Opinion on Objections of Port Authority Trans-Hudson Corporation to the Second Tentative Decree, Dated April 25, 1966

Although the record is devoid of any satisfactory guide for deciding a proper allowance for depreciation and obsolescence in using original cost—and it may even be reasonably urged that none should be allowed in this case —the court decided that some adjustment of original cost equitably would be proper to consider. It would be futile to go down the list of components, ascribing a percentage for depreciation and obsolescence to each, for there is much room for a difference of opinion as to how much any component should be discounted. No definitive help in this regard can be found in the trial record. The court, however, has had the benefit of a statutory viewing of the railroad in operation. This was of some help in considering some discount, and in believing some items could be chargeable with more depreciation and obsolescence than others. For instance, engineers' fees, attorneys' fees, insurance and liability charges, in its opinion, would not be subject to depreciation. Original cost of furniture and railroad cars would probably be charged off completely. However, there must be added to the list an item of 20 new cars purchased only several years before condemnation at a cost of $1,600,000, which would carry a low per cent of depreciation.

In the light of these considerations and the fact that during the years adequate maintenance for the continued operation of the railroad was provided and replacements were made, the court would prefer to consider all these components in the aggregate and not separately, for an over-all discount, which in its judgment fairly should be roughly one-third of original cost. Rounded, the figure which in its conscientious consideration of all factors then to be ascribed as the fair value of the components representing the remainder of the railway system—as unconnected items of property—is the sum of $20,000,000.

Justice Loreto's Opinion on Objections of Port Authority Trans-Hudson Corporation to the Second Tentative Decree, Dated April 25, 1966

Next, adding ten per cent as increment to the total ascribed to tunnels and subways plus all other components of the railway, the award of $55,000,000 is arrived at. It may be even assumed that there is room for difference of opinion as to the over-all percentage of discount for these components. Nonetheless this result would be fairly struck in justly using a higher percentage for increment—even fifteen per cent, which is amply warranted in this case.

No one can hope to find here the factors necessary for reaching some degree of mathematical exactitude in the ascertainment of just compensation. Therefore, the court charged with the responsibility of making such an award, faced with an onerous task, truly bears a grave responsibility. After searching and studying the evidence, passing upon credibility and weight of the evidence, and probing its conscience in order to arrive at an award which is fair, just and equitable, all that can be expected is the attainment of substantial justice.

Submit final decree.

Dated, April 25, 1966. J. S. C.

HUDSON RAPID TUBES CORPORATION

ORIGINAL COST OF RAILROAD PROPERTY
AT SEPTEMBER 1, 1962

	Original Cost of Property Condemned
Net Original Cost of Properties Constructed by Company:	
Engineering	$ 1,844,465.91
Right of Way	334,469.86
Other Land Used in Railroad Operations	691,586.13
Grading	2,758.47
Ballast	20,860.74
Ties	19,074.16
Rails, Rail Fastenings, & Joints	821,037.69
Special Work	70,602.39
Track & Roadway Labor	125,323.95
Paving	872.45
Roadway Machinery	40,148.47
Tunnels & Subways	31,999,802.76
Crossings, Fences, & Signs	421.30
Signals & Interlockers—Regular	1,248,214.68
Signals & Interlockers—Elec. Compressors	80,999.73
Communication Systems	136,219.93
Distribution System	865,891.13
Shops, Car Houses, & Garages	1,359,562.78
Stations, Misc. Buildings, & Structures	3,750,872.30
Passenger Cars	3,828,533.67
Service Equipment	13,405.75
Electric Equipment—Passenger Cars	2,421,336.39
Electric Equipment—Service Eqpt.	1,189.05
Shop Equipment	231,189.62
Furniture	11,358.50
Automotive & Miscellaneous Eqpt.	21,928.16
Power Plants	570,805.19
Power Plants—Substation Buildings	100,935.24
Power Plant Equipment	801,137.80
Transmission System	429,534.86
Franchises	49,499.98
Organization Expenditures	34,894.13
Interest during Construction	6,427,931.98
Law Expenditures	318,745.73
Injuries & Damages	394,009.89
Taxes	362,242.71
Miscellaneous Expenditures	1,402,807.61
Construction Work in Progress—Signals & Interlocker	1,039,768.92
Total	$61,874,440.01

C.A.L.
J.S.C.
6/9/66

EXHIBIT DD
(page 13)

APPENDIX E

Justice Loreto's Opinion Concerning Interest, Dated June 10, 1966

SUPREME COURT

NEW YORK COUNTY—SPECIAL TERM: PART VI
(Condemnation)

[SAME TITLE]

LORETO, J.:

The award in condemnation of the railroad having been made, there remain several questions as to the rate of interest that should be applied to it.

I

One is whether the railroad should be viewed as a "unitary operating entity" and, therefore, as PATH contends, the New York rate of interest should apply even though the property is also located in New Jersey. On the other hand, the claimant argues with reason that if the railroad were to be considered a unitary entity, it should be the New Jersey rate, where the greater part of the railroad physical assets are located, and not the New York rate, which should apply. For the purpose of computing interest, it has been stipulated to allocate 65% of the physical assets to New Jersey and 35% to New York.

Although in determining the amount of the award there was reason for considering the railroad as a unitary entity, there is no valid basis for applying that concept to the determination of the interest rate. For interest on the award is the measure of additional payment justly allowed for the delay in the payment of the award. The constitutional mandate requires payment to the owner of condemned property its value "at the time of the taking plus an amount sufficient to produce the full equivalent of

that value contemporaneously with the taking". (*United States* v. *Klamath Indians,* 304 U. S. 119, 123 [1938].)

Since the award is readily apportioned between the two States in the ratio of the physical assets in each of them, the interest on one portion may differ from the other, as the laws of the two States differ as to what they consider permissible interest. The bi-state legislation authorizing this condemnation requires the valuation of the property to be valued according to the laws of the State in which "the property is located or has its situs". (Mc. K. Unconsolidated Laws, § 6614 [Supp. 1965], N. J. Stat. Ann. § 32:1-35.63 [1963].) Too, it is logical to apply to the award allocable to each State the interest rate allowable in that State since the right to interest is but an extension of the underlying substantive right of recovery (*Davenport* v. *Webb,* 15 A D 2d 42 [1st Dept. 1961], affd. 11 N. Y. 2d 392 [1962]).

The next question is what rate of interest is allowable both in New York and in New Jersey.

II

The law in the State of New York at present by statute and court decision, prescribes 4% as the rate of interest payable on property situated in New York. (Matter of City of New York [Maxwell] 15 A D 2d 153, 179, aff'd sub nom.; Matter of City of New York [Schnurmacher Corp.], 16 N. Y. 2d 497; Matter of City of N. Y. [5th Ave. Coach], 23 A D 2d 463 sub. judice in the Court of Appeals). However, the claimant seriously argues that in this instance, on the record here made, limiting the interest to that rate would result in less than just compensation mandated by the constitution because it would not meet the standard of the "full equivalent" of the payment of the award "contemporaneously with the taking" (*United States* v. *Klamath Indians, supra,* p. 123).

Justice Loreto's Opinion Concerning Interest, Dated June 10, 1966

Section 2501 of the Unconsolidated Laws of New York provides that the rate of interest to be paid by a "public corporation" upon "any judgment or accrued claim" shall not exceed 4% annually. Indisputably, the award is an accrued claim and PATH, a public corporation. Recently in Matter of City of New York (Bronx River Parkway), 284 N. Y. 48, 54, affd. 313 U. S. 540, the court overruled a similar contention as claimant's stating: "In the absence of evidence as to what such additional sum should be, interest, as provided by law, meets the constitutional requirement". In order to overcome this objection, the claimant has submitted evidence on this point to which PATH objected as irrelevant.

Although the New York statute has treated public corporations as "favored debtors", surely they may not be unduly favored so as to deprive the owner of his constitutional right to just compensation. For the years 1962 through 1965, the proof offered fails to show that PATH would be unduly favored in New York by reason of the 4% prescribed interest. For the year 1966, however, there appears a sharp rise in interest rate on the varied types of certificates, notes and bonds. This has signs of continuing into the unpredictable future. And surely payment of the award because of appeals that will be taken, may not be made for some appreciable time.

Although in this proceeding for the years 1962 through 1965 the maximum rate of 4% fixed by statute represents "a median which cannot seriously be questioned as substantially just" (Matter of City of New York [Maxwell], 15 A D 2d 153, 182, affd. 16 N. Y. 2d 497), on the uncontradicted proof that rate for the year 1966, would appear to unduly favor PATH.

The judgment of the New York legislature of 1939 read in the statute cannot forever remain immutable. After the lapse of many years and firm proof showing a marked

and continuing rise in interest rate throughout the country, it is and can be seriously questioned as constitutionally valid. "* * * No statute may interfere with or prejudice" the right to just compensation, including the right to additional compensation for any delay in making payment (Matter of City of New York [Schnurmacher] 16 N. Y. 2d 497 [1965]).

Of the several years involved here, the proof is satisfactory only as to the year 1966 in establishing the statutorily prescribed 4% interest to be unjust. This is not enough to warrant a departure from the interest rate currently approved by the latest decisions of the New York appellate courts. What can or may be done in the matter if several years more elapse before payment and the general market rate of interest continues at its present or even higher levels, the court need not venture to say. In any event, a reconsideration of the statute by the legislature may well be in order.

III

For the New Jersey portion of the award, claimant asks 6% interest and PATH contends that it should be 4%. Unlike New York, the allowance of interest is not prescribed by statute in New Jersey. It is not based on any equitable principles but is deemed to be part of the just compensation.

Thus, in *State Highway Commissioner* v. *Seaway, Inc.* (N. J. Supreme Court, decided Feb. 21, 1966), although the court noted in the beginning of its opinion that "The rate of interest is not an issue on this appeal", and declared that the State is constitutionally required to make an award of interest because of the delay in making payment, it pertinently added: "* * * This requirement is not based on any equitable principles, nor upon a theory that the owner must be reimbursed for the income he might have

obtained had he remained in possession of his property. Rather, the constitution demands that the condemnee receive interest as a part of his right to just compensation".

However, regarding the amount or rate of interest, the New Jersey courts declare this is assessable upon a consideration of general equitable principles (*N. J. Highway Authority* v. *Ellis*, 24 N. J. 1, 7 [1957]; *Acquakanonk Water Co.* v. *Weidman*, 99 N. J. L. 175, 178 [Court of Errors and Appeals, 1923]).

Therefore, PATH argues, since the railroad was not a profitable operation prior to the taking, this fact should be treated as an equitable consideration favoring a 4% rate of interest. This argument stems from a viewing of interest as compensation for deprivation of the use of the property and its deficit operation as an important factor to consider in determining the interest rate. This is an erroneous conclusion based on a false premise; for interest is viewed by the Supreme Court as compensation for the delay in making payment for the property taken and not compensation for deprivation of property. This view is contrary to the significance that should be given to the portion of the quoted passage in *State Highway Commissioner* v. *Seaway, Inc. (supra)* to the effect: " * * * This requirement (i.e. of interest) is not based * * * upon a theory that the owner must be reimbursed for the income he might have obtained had he remained in possession."

Also, in *East Orange* v. *Board of Chosen Freeholders, Essex Cty.*, 215 A. 2d 566, 571 (N. J. Super. Ct., App. Div., 1965) where, the plaintiff having conceded that equitable considerations did not warrant 6% interest, the court explained its allowance of interest at 4%, as follows: "From August 1, 1962, even though the premises were not income-producing, the assets of plaintiff were reduced in an amount equal to the value thereof. Further, *plaintiff was deprived of an opportunity to invest the monetary equivalent of the land*" (italics supplied).

Justice Loreto's Opinion Concerning Interest, Dated June 10, 1966

The fact that the railroad as a going operation failed to show a profit has no relevancy in determining the interest rate. It is a fact that has properly been considered in determining the award. If this factor were to be taken into account again in the consideration of the allowable interest rate, it would be somewhat comparable to inflicting in the one proceeding double punishment upon the condemnee.

The legal rate of interest in New Jersey is 6% as "a matter of usage, not of statute" (*Cohrs.* v. *Igoe Bros., Inc.*, 177 A. 2d 284, 291 [N. J. Super. Ct. App. Div. 1962]). In highway condemnations the New Jersey legislature has prescribed its 6% legal rate of interest to be paid on the excess of the award above the amount deposited in taking possession (N. J. S. A., § 27: 12B-7 [Supp. 1965]). In this instance, therefore, the New Jersey legislature has recognized the legal rate of 6% interest to be appropriate irrespective of the unprofitability or nature of use of any property taken. It was not concerned with balancing lack of profit or losses suffered with benefits that might accrue to the condemnee by the allowance to him of the legal rate of interest.

In *Kieselbach* v. *Commissioner*, 317 U. S. 399, 403, where the court decided to treat interest on an award in condemnation as income for federal income tax purposes, it stated: "This additional payment was necessary to give the owner the full equivalent of the value of the property at the time it was taken. Whether one calls it interest on the value of payments to meet the constitutional requirement of just compensation is immaterial."

The award represents the monetary equivalent of the property taken. When paid, it is the substitute for the property. Payment, on general equitable principles, is due on taking possession by the condemnor. It is then when the owner should receive the equivalent of his taken property. Just compensation must be made as of the

time the owner is deprived of his property (*United States* v. *Rogers,* 255 U. S. 163). As this is not practical, the additional allowance because of the delay in payment is awarded to effectuate the constitutional requirement of just compensation.

In *N. J. Highway Authority* v. *Ellis,* 24 N. J. 1, 8, regarding the deposit made in court pursuant to statute on taking possession, the court stated: "The payment into court amounts to constructive payment to the owner and is given the same legal effect by the statute as actual payment. The money in such cases represents the land taken—it is the thing which the statute substitutes for the land."

And speaking of the owner's right to invest for his own benefit the deposited payment if withdrawn by him, the court added:

> "But the owner has the option of either leaving the estimated compensation on deposit with the court where it is earning interest, or withdrawing it. If he withdrew it, for example, before interest might be paid under the rules, it could not be argued that any profit or capital gain he might make in the interim on the reinvestment of these funds could be used to abate either the payment of the principal or interest on the excess of the award over the deposit" (p. 9).

Similarly, if the deposit actually represented the full award finally decreed, the condemnee would have had the benefit of its use for investment. This would represent all that he was entitled to receive from the date possession was taken and he would have no obligation to refund to the condemnor any profits accruing in the interval prior to final decree in excess of any interest computed thereon whether it were four, five or six percent.

What valid equitable reasons are there that might militate against the allowance of the legal rate of interest? The only reason advanced by PATH is that the railroad

had not been operating profitably prior to the taking. But this is not a valid one. From the claimant's standpoint, it had forever lost its property and then what it was deprived of was the use of the monetary equivalent of the property taken. The right to additional compensation—called interest—is granted to the condemnee so that he might be put in position comparable to that in which he would have been, had he been paid the award contemporaneously with the taking.

Absent any statute or valid equitable reason, the legal rate of interest established in New Jersey should be approved, as it was of another State by the Supreme Court in *Seaboard Air Line Ry.* v. *U. S.*, 261 U. S. 299, 309, where the court stated (306):

> "The legal rate of interest, as established by the South Carolina statute was applied in this case. This was a palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain, namely, of making 'just compensation' for the land as it stands, at the time of taking. (United States *v.* Sargent [C.C.A., Eighth Circuit], 162 Fed. 81, 84.)"

Therefore, for that portion of the railroad award under the stipulation allocable to the State of New Jersey, the interest rate of six percent is granted.

IV

Claimant seeks payment as to the buildings award 6% interest on $9,066,600 thereof, which represents the unpaid portion of 60% of their assessment from November 1, 1962 to December 26, 1963, because PATH, the condemnor, failed to make this advance payment mandated by statute.

Section 6901, subdivision X of the Unconsolidated Laws of New York State provides in part: "* * * Where the Port Authority has taken possession of the real property

to be acquired prior to the entry of the final decree, the Port Authority *shall,* on request, pay to the parties entitled thereto a sum equal to sixty percentum of the real property taken, * * * within sixty days after taking possession thereof * * *''. (Italics supplied.)

PATH took possession of the property on September 1, 1962, and written demand for payment on or before November 1, 1962 had been made. Its excuse for its failure to have made the payment as required by the statute is that there was pending and still undecided the litigation over the constitutionality of the taking, which was finally decided by the Supreme Court on December 26, 1963.

But as Mr. Justice Gold earlier said in a proceeding pertaining to this subject, ''* * * It was under no obligation to apply to be placed in possession of the properties sought to be condemned until after the validity of the legislation had finally been adjudicated. Had it awaited such an adjudication before applying for possession, it would not have subjected itself to the liability for an advance payment imposed by subdivision (x) of section 1 * * *''. (Matter of Port Authority Trans-Hudson Corporation, 38 Misc. 2d 412, 415).

PATH cannot seriously urge that it could not safely have made the advance payment because of the possibility that the taking might ultimately be held to be illegal, and that if it had made payment, it might find difficulty in having it refunded. This risk, if any, could have been overcome by adequate assurances for refunding the payment with adjustments for use of the property, if the condemnation were vitiated.

An objection was raised by PATH before Mr. Justice Gold to the effect that the statute requires the issuance of a certificate by its general counsel showing the person legally entitled to receive payment and this he could not issue because of alleged open questions affecting title to the realty. As to this objection, his opinion states: ''The

court is unable, on the inadequate record now before it, to hold that these various possible defects of title are wholly lacking in merit and that general counsel's failure to furnish the required certificate is wholly without basis." (p. 419) The application for a direction of payment was accordingly denied without prejudice to a renewal after the issuance of the certificate of general counsel or a showing that there was no merit to the alleged defects of title.

At no time during the lengthy condemnation trial, has there been any proof of defect in titles. The withholding of the certificate of general counsel was arbitrary and without substantial basis and therefore the requirement for its issuance, should be treated as a dilatory tactic.

Claimant points to the financial burden it unjustly suffered in that it was required to pay interest on its bonds at 6 per cent during that time, which it could have met with the mandated prepayment if it had not been inexcusably withheld. It therefore seeks that rate in damages. This is a factor under the facts presented, of which equity would take cognizance.

The question raised, therefore, is whether the rate of interest sought as damages may be decided on purely equitable principles in the context of this proceeding. It seems to the court that it may not. The court is now concerned with the final award and decree.

The mandate for the prepayment is found in the statute. If the legislature intended to create thereby also a remedy for the owner, it went but half way as the statute fails to specify the relief he may have if unreasonably denied the right. The court may not here look beyond the statute to find or create a remedy in this instance because of what may be considered inadequate legislation, which seems to confer a meaningless or hollow right to the owner, the possession of whose property has been taken.

At this stage of the proceeding after the final award, the award attributable to property in New York State will bear a single or uniform rate of interest.

Justice Loreto's Opinion Concerning Interest, Dated June 10, 1966

The prepayment not made, now included in and part of the full award, may not be treated differently from the remainder of the award in view of the statute. If 6 per cent were allowed on the amount of prepayment during the time it had been withheld, under the same subdivision of the act, the prepayment with the interest paid would have to be deducted from the total award with whatever interest thereon is allowed. For the concluding sentence of subdivision X of section 6901 reads: "When any such advance payment shall have been made, the port authority, on paying the awards for the real property acquired, shall deduct from the total amount thereon allowed as compensation the sum advanced plus interest from the date of the payment of such advance to the date of the final decree, and the balance shall be paid as hereinbefore provided in subdivision (w) hereof." Therefore, it may be said that this statute does not contemplate a higher rate of interest on the withheld prepayment than is granted on the final award.

One may wonder whether the first quoted provision of the act mandating a prepayment becomes pointless, when it is not made as required. Perhaps the only relief for such default would have had to be found before the final decree in equity, by first obtaining, if possible, a court direction for its payment and then, if not paid pursuant to such court order, by seeking a contempt order imposing a fine to cover the damages suffered in withholding the mandated prepayment.

The foregoing constitutes the findings and decision of the court on the questions raised.

Dated, June 10, 1966.

C. A. L.
J. S. C.

APPENDIX F

N. Y. Sess. Laws 1962, Ch. 209, § 14, N. Y. Unconsol. Laws § 6614 (McKinney Supp. 1966). N. J. Laws 1962, Ch. 8, §14, N. J. Rev. Stat. § 32:1-35.63 (1963).*

§14. If the port authority shall find it necessary, convenient or desirable to acquire (either directly or through a subsidiary corporation) from time to time any real property or any property other than real property (including but not limited to contract rights and other intangible personal property and railroad cars or other rolling stock, maintenance and repair equipment and parts, fuel and other tangible personal property), for any of the purposes of this act whether for immediate or future use (including temporary construction, rehabilitation or improvement), the port authority may find and determine that such property, whether a fee simple absolute or a lesser interest, is required for a public use, and upon such determination the said property shall be and shall be deemed to be required for such public use until otherwise determined by the port authority, and such determination shall not be affected by the fact that such property has theretofore been taken for and is then devoted to a public use; but the public use in the hands of or under the control of the port authority shall be deemed superior to the public use in the hands of any other person, association or corporation.

The port authority may acquire and is hereby authorized so to acquire from time to time, for any of the purposes of this act, such property, whether a fee simple absolute or a lesser estate, by condemnation (including the exercise of the right of eminent domain) under and pursuant to the provisions of the condemnation law of the state of New York in the case of property located in or having its situs

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* Certain portions of the statute have been italicized for ease in locating them in the text.

in such state, and revised statutes of New Jersey, title twenty:one-one et seq., in the case of property located in or having its situs in such state, or, at the option of the port authority, as provided in section fifteen of chapter forty-three of the laws of New Jersey of nineteen hundred forty-seven, as amended, in the case of property located in or having its situs in such state, and as provided in chapter eight hundred nineteen of the laws of New York of nineteen hundred forty-seven in the case of property located in or having its situs in such state, or pursuant to such other and alternate procedure as may be provided by law of the state in which such property is located or has its situs; and all of said statutes for the condemnation of real property shall, for any of the purposes of this act, be applied also to the condemnation of other property authorized by this section, except that such provisions as pertain to surveys, diagrams, maps, plans or profiles, assessed valuations, lis pendens, service of notice and papers, filing in the office of the clerk in which the real property affected is situated and such other provisions as by their nature cannot be applicable to property other than real property, shall not be applicable to the condemnation of such other property. In the event that any property other than real property is acquired by condemnation under this act then, with respect to such other property, notice of such proceeding and all subsequent notices or court processes shall be served upon the owners of such other property and upon the port authority by personal service or by registered or certified mail, except as may be otherwise directed by the court.

Anything herein to the contrary notwithstanding, any property to be acquired for any of the purposes of this act, which property shall not have been used by its owner or owners or any of his or their predecessors in connection with and shall not have been acquired by its owner or owners or any of his or their predecessors for use in connection with the effectuation by a railroad company or

companies of the Hudson tubes or the Hudson tubes extensions prior to port authority acquisition, shall, if such property is personal property, be acquired only by agreement with the owner or owners and shall, if such property is not personal property and is to be acquired by condemnation, be acquired in an action or proceeding in the state in which such property is located or has its situs. Except as so provided, the port authority is hereby authorized and empowered, in its discretion, from time to time to combine any property which is to be acquired as aforesaid by condemnation for any of the purposes of this act for acquisition in a single action or proceeding notwithstanding that part of the property so to be acquired is located or has its situs in New Jersey and part in New York or is personal property or mixed real and personal property or may be owned by more than one owner; *and, except as hereinafter provided, each such single action or proceeding to acquire property located or having its situs part in New Jersey and part in New York shall be pursuant to the laws of whichever of the two said states the port authority shall estimate contains the greater part in value of all the property to be acquired in such action or proceeding* (hereinafter sometimes called the forum state) and in the court or courts specified in the laws of the forum state for the condemnation by the port authority of property located or having its situs in the forum state pursuant to this act, in which event, notwithstanding the location or situs of said property, each of said two states hereby confers upon its said court or courts jurisdiction of such action or proceeding and the port authority and any subsidiary corporation so acquiring such property and the owners of such property shall be bound by the judgments, orders or decrees therein. *In any such action or proceeding the court or courts of the forum state shall apply the laws of valuation of the other state (hereinafter sometimes called the nonforum state) to the valuation of the property which is located or has its situs*

in the nonforum state and shall include in the total compensation to be made to any owner of property in both states being acquired in such action or proceeding the increment, if any, in the value of such property in both states, by reason of its being in a single ownership. If a judgment, order or decree in such an action or proceeding shall vest title in or otherwise award to the condemnor the right to possession of property located or having its situs in the nonforum state, then the court or courts of the nonforum state shall grant full faith and credit to such judgment, order or decree and upon petition by the condemnor to the court or courts of the nonforum state specified in the laws thereof for the condemnation by the port authority of property located or having its situs in the nonforum state pursuant to this act, presenting a true copy of such judgment, order or decree and proof that it is in effect, that any conditions thereof have been met, that at least five days' notice of such petition has been served by registered or certified mail upon all owners of the property affected who appeared in the original action or proceeding in the forum state or who may be owners of record, and without further proof, a judgment, order or decree of such court or courts of the nonforum state shall be entered granting condemnor possession of the property located or having its situs in the nonforum state and confirming any title which shall have vested in the condemnor by the judgment, order or decree of the court or courts of the forum state.

The owner of any property acquired by condemnation or the exercise of the right of eminent domain for any of the purposes of this act shall not be awarded for such property any increment above the just compensation required by the constitutions of the United States and of the state or states in which the property is located or has its situs by reason of any circumstances whatsoever.

Nothing herein contained shall be construed to prevent the port authority from bringing any proceedings to remove a cloud on title or such other proceedings as it may, in its discretion, deem proper and necessary, or from acquiring any such property by negotiation or purchase.

Where a person entitled to an award in the proceedings to condemn any property for any of the purposes of this act remains in possession of such property after the time of the vesting of title in the condemnor, the reasonable value of his use and occupancy of such property subsequent to such time, as fixed by agreement or by the court in such proceedings or by any court of competent jurisdiction, shall be a lien against such award, subject only to liens of record at the time of the vesting of title in the condemnor.

APPENDIX G

N. Y. Sess. Laws 1962, Ch. 209, § 17, N. Y. Unconsol. Laws § 6617 (McKinney Supp. 1966); N. J. Laws 1962, Ch. 8, § 17, N. J. Rev. Stat. § 32:1-35, 66 (1963).

§ 17. This section and the preceding sections hereof constitute an agreement between the states of New York and New Jersey supplementary to the compact between the two states dated April thirty, nineteen hundred twenty-one and amendatory thereof, and shall be liberally construed to effectuate the purposes of said compact and of the comprehensive plan heretofore adopted by the two states, and the powers granted to the port authority shall be construed to be in aid of and not in limitation or in derogation of any other powers heretofore conferred upon or granted to the port authority.

APPENDIX H

REMITTITUR OF THE NEW YORK COURT OF APPEALS
DATED OCTOBER 31, 1967

COURT OF APPEALS

STATE OF NEW YORK, ss: PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 31st day of October in the year of our Lord one thousand nine hundred and sixty-seven, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

REMITTITUR October 31, 1967.

1. No. 100. 67

IN THE MATTER OF THE APPLICATION OF THE PORT AUTHORITY TRANS-HUDSON CORPORATION to acquire title &c.—for Hudson Tubes purposes.

HUDSON RAPID TUBES CORPORATION & ano.,
Appellants-Respondents,

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Respondent-Appellant.

BE IT REMEMBERED, That on the 7th day of March in the year of our Lord one thousand nine hundred and sixty-seven, Hudson Rapid Tubes Corporation & ano., the appel-

lants-respondents in this cause, came here unto the Court of Appeals, by Sullivan & Cromwell, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Port Authority Trans-Hudson Corporation, the respondent-appellant in said cause, afterwards appeared in said Court of Appeals by Sidney Goldstein, its attorney, and also filed a Notice of Appeal. Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. David W. Peck, of counsel for the appellants-respondents, and by Mr. Whitney North Seymour, of counsel for the respondent-appellant, and by Mr. Julius L. Sackman, of counsel for the amicus curiae State of New York, and by Mr. David A. Biederman, of counsel for the amicus curiae State of New Jersey, said counsel having been admitted pro hac vice, and after due deliberation had thereon, did order and adjudge that on appeal by the claimant Hudson Rapid Tubes Corporation the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is modified, with costs in this Court and in the Appellate Division, in accordance with the opinion herein and, as so modified, affirmed, and the matter remanded to Special Term for further proceedings in accordance with the opinion herein. On appeal by the claimant Hudson and Manhattan Corporation, the order of the Appellate Division appealed from herein be and the same hereby is affirmed, without costs. In view of the disposition herein, cross-appeal of the Port Authority Trans-Hudson Corporation be and the same hereby is dismissed as academic.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be modified and affirmed and cross-appeal dismissed &c., as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, October 31, 1967.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

(SEAL)

APPENDIX I

ORDER OF THE NEW YORK COURT OF APPEALS DATED DECEMBER 7, 1967 AMENDING REMITTITUR

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of December A. D. 1967.

PRESENT, HON. STANLEY H. FULD, *Chief Judge, presiding.*

1 Mo. No. 1231

IN THE MATTER OF THE APPLICATION OF THE PORT AUTHORITY TRANS-HUDSON CORPORATION to acquire title &c.,— for Hudson Tubes purposes.

HUDSON RAPID TUBES CORPORATION & ano.,
Appellants-Respondents,

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Respondent-Appellant.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the respondent-appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Appendix I

Upon the appeal herein there was presented and passed upon the following question under the Constitution of the United States, viz.: Petitioner-Respondent-appellant Port Authority Trans Hudson Corporation argued that any award for the condemnee's property in excess of scrap value would violate Congressionally sanctioned bi-state legislative compact and would therefore be contrary to Article I, § 10, Clause 3 of the Constitution of the United States. The Court of Appeals hold that Article I, § 10, Clause 3 of the Constitution of the United States was not violated.

And the Supreme Court of New York County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Gearon Kimball, *Deputy Clerk*

APPENDIX J

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

IN THE MATTER OF THE APPLICATION OF THE PORT AUTHORITY TRANS-HUDSON CORPORATION to acquire title to certain property in the State of New York and the State of New Jersey for Hudson Tubes purposes.	Index No. 10163/1962

Judgment

Claimant Hudson Rapid Tubes Corporation having appealed to the Court of Appeals from the order of the Appellate Division, First Department, entered and filed in the office of the Clerk of said Appellate Division on the 30th day of December, 1966, modifying on the law and the facts, and as so modified, affirming the final decree of the Supreme Court, New York County, entered and filed on June 13, 1966, and claimant Hudson & Manhattan Corporation having appealed to the Court of Appeals from the above described order of the Appellate Division, First Department, and petitioner Port Authority Trans-Hudson Corporation having cross-appealed therefrom, and the said appeals having come on to be heard before the said Court of Appeals and the said Court having duly made an order on October 31, 1967, which

(i) on the appeal by claimant Hudson Rapid Tubes Corporation, modified and, as so modified, affirmed the above described order of the Appellate Division, with costs in the Court of Appeals and in the Appellate Division to claimant Hudson Rapid Tubes Corporation, and remanded the matter to Special Term for further proceedings,

(ii) on the appeal by claimant Hudson & Manhattan Corporation, affirmed the above described order of the Appellate Division, without costs, and

(iii) on the cross-appeal by petitioner Port Authority Trans-Hudson Corporation, dismissed said cross-appeal as academic,

a copy of which order of the Court of Appeals together with the record on appeal was remitted to and filed in the office of the Clerk of the County of New York on the 6th day of December, 1967, and the costs and disbursements of claimant Hudson Rapid Tubes Corporation having been duly taxed in the sum of $8,561.07;

Now, on motion of Sullivan & Cromwell, attorneys for claimant Hudson Rapid Tubes Corporation, it is

ADJUDGED that the order of the Appellate Division entered on the 30th day of December, 1966, be, and the same hereby is, (1) on appeal by claimant Hudson Rapid Tubes Corporation, modified, with costs in the Court of Appeals and in the Appellate Division to claimant Hudson Rapid Tubes Corporation, to the extent of

(i) reinstating so much of the decree of Special Term as awarded $30,000,000 for the subway and tunnel properties and as fixed the rate of interest applicable to the award for the New Jersey properties, and

(ii) remanding to Special Term for further consideration, in accordance with the opinion of the Court of Appeals, questions relating to the determination of value for the remaining properties and going concern value,

and, except as so modified, affirmed, and (2) on appeal by claimant Hudson & Manhattan Corporation, affirmed, without costs; and it is further

ADJUDGED that the claim of claimant Hudson Rapid Tubes Corporation with respect to the subway and tunnel properties taken be severed from the claims of said claimant with respect to the remaining properties and going concern value; and it is further

ADJUDGED that claimant Hudson Rapid Tubes Corporation, 30 Church Street, New York City, New York, recover of Port Authority Trans-Hudson Corporation, 111 Eighth Avenue, New York City, New York, for its subway and tunnel properties taken (after deducting an advance payment of $3,000,000 received on December 26, 1963) the sum of $27,000,000, together with interest from the date of vesting, September 1, 1962, to the date hereof in the sum of $7,831,075.36, together with the sum of $8,561.07 for costs and disbursements as taxed for a total sum of $34,839,636.43 (with interest to accrue, from the date hereof until the total of the amounts adjudged recoverable hereby shall have been paid, at the rate of 6% per annum on 65%, and at the rate of 4% per annum on 35%, of such total or such portion thereof as shall remain unpaid).

Judgment signed and entered this 29th day of December, 1967.

JAMES McGURRIN
Clerk

(SEAL)

FILED
Dec. 29, 1967
N. Y. County Clerk's Office

Entry of the above judgment is hereby consented to:

s/ SIDNEY GOLDSTEIN

s/ SULLIVAN & CROMWELL

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1054

THE PORT AUTHORITY TRANS-HUDSON CORPORATION,

Petitioner,

v.

HUDSON RAPID TUBES CORPORATION, a corporation of the State of Delaware,

Respondent.

BRIEF FOR THE STATE OF NEW JERSEY, *AMICUS CURIAE,* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ARTHUR J. SILLS,
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and
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Deputy Attorney General,
On the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 1054

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Petitioner,

v.

HUDSON RAPID TUBES CORPORATION,

Respondent.

BRIEF FOR THE STATE OF NEW JERSEY, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Statement

The Attorney General of the State of New Jersey submits this brief on behalf of the State appearing as *amicus curiae* in support of the petition of the Port Authority Trans-Hudson Corporation that a writ of certiorari be issued to review the judgment of the Court of Appeals of the State of New York, entered on October 31, 1967 and reported at 20 N. Y. 2d 457, 231 N. E. 2d 734.

New Jersey is filing this brief to protect its rights under two provisions of a Compact which it has entered into with New York.[1] The Compact directed the Port of New York Authority, a joint agency of both States (either acting directly or through a wholly-owned subsidiary) to acquire for continued operation a severely deteriorated, hopelessly unprofitable interstate commuter railroad, 65% of which is located in New Jersey. At the time the Compact was executed, the railroad (then known as the Hudson Tubes) was on the verge of abandonment by its private owner who had eagerly sought public acquisition. The Compact specified that in valuing the railroad, the "courts of the forum state [New York] shall apply the laws of valuation of the other state [New Jersey] . . . to the valuation of the property which is located . . . in the non-forum state." It also provided that the condemnee "shall not be awarded . . . any increment above the just compensation required by the Constitutions of the United States and of the state or states in which the property is located . . . by reason of any circumstances whatsoever."

Despite these provisions, the New York Court of Appeals (a) *expressly* refused to follow New Jersey condemnation law in valuing that portion of the railroad located in New Jersey and (b) based its condemnation award for the entire railroad upon the alleged gain to the taker resulting from the condemnation even though every decision of the New Jersey courts (under the New Jersey Constitution),

---

[1] Ch. 8, Laws of N. J., 1962; Ch. 209, Laws of N. Y., 1962. This legislation constitutes an agreement between the states amendatory of and supplemental to the Port Compact and comprehensive plan legislation, Ch. 151, Laws of N. J., 1921; Ch. 154, Laws of N. Y., 1921; Ch. 9, Laws of N. J., 1922; Ch. 43, Laws of N. Y., 1922; consented to by Congress, 42 Stat. 174 (1921); 42 Stat. 822 (1922). The constitutionality of the 1962 legislation was upheld in *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority*, 12 N. Y. 2d 379, *appeal dismissed for want of a substantial Federal question*, 375 U. S. 78, *rehearing denied*, 375 U. S. 960 (1963).

every decision of this Court (under the United States Constitution) and every *prior* decision of the New York courts (under the New York Constitution), has, without any exception whatsoever, held that a condemnation award must be based solely on economic loss to the condemnee with any gain to the condemnor being irrelevant. See, e.g., *Kimball Laundry Co.* v. *United States,* 338 U. S. 1 (1949); *Olson* v. *United States,* 292 U. S. 246 (1934); *Shoemaker* v. *United States,* 147 U. S. 282 (1893); *Currie* v. *Waverly & N.Y.B.R. Co.,* 52 N. J. L. 381, 20 Atl. 56 (1890); *St. Agnes Cemetery* v. *State,* 3 N. Y. 2d 37 (1957).

New Jersey's interest in this matter is so substantial that in addition to this brief it has previously submitted to this Court a motion and brief urging this Court to take original jurisdiction over this controversy. (*State of New Jersey* v. *State of New York and Hudson Rapid Tubes Corporation* (No. 34, Original, filed on January 22, 1968)). New Jersey's position in the original action, like the Port Authority Trans-Hudson Corporation's position in seeking a writ of certiorari in this case, is that the judgment of the New York Court of Appeals is violative of the express terms of New Jersey's agreement with New York. A copy of New Jersey's brief in the original action is attached to this brief as an appendix. The facts of the controversy are contained therein and therefore need not be repeated here.

Similarly, New Jersey's basic legal contentions regarding the violation of its rights under its agreement with New York are likewise contained in its brief in the original action and need not be repeated.

This brief will be limited solely to showing why this controversy should, in fairness to the people of New Jersey, be reviewed by this Court.

Reasons for Granting the Writ

A writ of certiorari should be issued in the instant case because the contractual breach by the New York Court of Appeals threatens the continued usefulness of one of the most noteworthy governmental achievements of our federal system in this century—the utilization of interstate compacts to create operating agencies which are charged with the responsibility of solving regional problems that transcend individual state boundary lines. New Jersey is a party to ten of these compacts. This Court has already affirmed the existence of its duty to review by writ of certiorari a decision of the highest court of a compacting state when officials of a compact agency allege that such decision constitutes a serious violation of the interstate agreement under which their agency operates. *Dyer* v. *Sims*, 341 U. S. 22 at 28 (1951).

In addition, a writ of certiorari should be granted in the instant case because the controversy concerns a problem of federal law which is both important and current, *i.e.*, the proper standard to be utilized in valuing a hopelessly unprofitable interstate railroad which is required by public law to be continued in use. This legal issue is now in litigation in another case before a three-judge statutory court and it will most probably come before this Court for final resolution late this Spring or early next Fall.[1]

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[1] *The New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee* v. *United States and Interstate Commerce Commission* (S. D. N. Y. 68 Civ. 296); *The Chase Manhattan Bank* v. *United States and Interstate Commerce Commission* (S. D. N. Y. 68 Civ. 306); *Manufacturers Hanover Trust Company* v. *United States and Interstate Commerce Commission* (S. D. N. Y. 68 Civ. 308); *United States Trust Company of New York* v. *United States and Interstate Commerce Commission* (S. D. N. Y. 68 Civ. 344); and *Oscar Gruss & Son* v. *United States and Interstate Commerce Commission* (S. D. N. Y. 68 Civ. 345).

Moreover, the general economic plight of our railroads out of which the instant controversy arises has become increasingly a major national problem.[1] As we shall show, the decision below by creating "new and revolutionary law"[2] as to what constitutes just compensation and thereby changing "the only invariable principle of valuation in condemnation proceedings"[3] seriously jeopardizes the fulfillment of the Congressional purpose behind the federal grant-in-aid program authorized by the Urban Mass Transportation Act,—the purpose of which is to preserve the existence of essential commuter passenger facilities serving our nation's urban areas. Under that program federal funds cannot be made available "to any State or local public body" for the acquisition of privately-owned transit facilities unless "just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws." 49 U.S.C. §1602(c). Excessive compensation for the acquisition of such companies could severely limit the beneficial use of public funds—Federal and local—available for the preservation of mass transit facilities.

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[1] See Transportation Act of 1958, 72 Stat. 568, 49 U.S.C. §1231-40 (1958) and Digest, Analysis and Index of Testimony of the Hearings Before a Subcommittee on Transportation and Communications of the House Committee on Interstate and Foreign Commerce, 84th Cong., 2nd Sess., (1956).

[2] Judge Burke dissenting in 20 N. Y. 2d 457, 482, 483.

[3] *Spitzer* v. *Stichman*, 278 F. 2d 402, 410 (2d Cir. 1960).

POINT I

The decision by the New York Court of Appeals must be reviewed by this Court in order to preserve the future usefulness of congressionally sanctioned interstate compacts.

In *Dyer* v. *Sims*, 341 U. S. 22, 28 (1951), this Court clearly recognized that a decision such as the one by the New York Court of Appeals in this case presents a most serious federal question:

> "To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies * * * is the function and duty of the Supreme Court of the Nation."

This Court also pointed out that:

> "It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State." *Ibid.*

This Court's jurisdiction to review these questions by writ of certiorari was conclusively established in *Delaware River Joint Toll Bridge Commission* v. *Colburn*, 310 U. S. 419 (1940). There, this Court granted a writ of certiorari to review a decision by the highest court of New Jersey obligating the Bridge Commission to pay consequential damages for private property adversely affected by bridge construction. The Delaware Commission, like the Port Au-

thority, is a "body politic" created by a compact between two states consented to by Congress. The first issue in *Colburn,* pursuant to this Court's directive, was that of the Court's jurisdiction under its certiorari power. See 308 U. S. 549 (1940). A unanimous court, speaking through Justice Stone, conclusively determined this question by ruling:

> ". . . that the construction of such a compact sanctioned by Congress . . . involves a federal 'title, right, privilege or immunity' which when 'specially set up or claimed' in a state court may be reviewed here on certiorari . . ." 310 U. S. at 427.[1]

The growing importance of interstate compacts to the future of our federal system requires that certiorari be

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[1] Thus, the only qualification set out by Justice Stone was that the federal right, title, privilege or immunity must be "specially set up or claimed in a state court." The federal question in the case at bar was "specially set up or claimed" in the New York courts. Thus, it "may be reviewed here on certiorari." Petitioner specifically pointed out to the trial court that its proposed award would violate the Compact's provisions and, in each of the New York appellate courts, including the Court of Appeals, it pointed to the applicable Compact provisions and informed the court that any award for the railroad in excess of the prior owner's economic loss would violate the Compact. (These facts are detailed on pages 15 through 18 of the Port Authority Trans-Hudson Corporation's petition for certiorari.) Accordingly, the federal question now raised before this Court had been previously raised in the New York courts. The amendment which the New York Court of Appeals made to its remittitur is conclusive on this point. (See page 154-155a of the Appendix to the Petition for Certiorari filed by the Port Authority Trans-Hudson Corporation). Under these circumstances, it is clear that this Court has jurisdiction to grant the writ and construe and enforce the Compact according to its express terms.

granted in this case. A half century ago there was not a single agency in the United States created by interstate compact. The first such agency was The Port of New York Authority created by interestate compact in 1921. New Jersey is a party to ten of these compacts.[1] Interstate

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[1]*Name of Agency*	*Party States*	*Congressional Consent to Compact*
he Port of New York Authority	New York, New Jersey	42 Stat. 174 (1921)
elaware River Port Authority	New Jersey, Pennsylvania	47 Stat. 308 (1932)
nterstate Sanitation Commission	Connecticut, New Jersey, New York	49 Stat. 932 (1935)
elaware River Joint Toll Bridge Commission	New Jersey, Pennsylvania	49 Stat. 1058 (1935)
alisades Interstate Park Commission	New Jersey, New York	50 Stat. 719 (1937)
tlantic States Marine Fisheries Commission	Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Virginia.	56 Stat. 267 (1942)
'aterfront Commission of New York Harbor	New Jersey, New York	67 Stat. 541 (1953)
i-State Transportation Commission	Connecticut, New Jersey, New York	75 Stat. 170 (1961)
elaware River Basin Commission	New York, New Jersey, Delaware, Pennsylvania, United States	75 Stat. 668 (1961)
elaware River and Bay Authority	Delaware, New Jersey	76 Stat. 560 (1962)

agencies throughout the country are currently engaged in developing transportation facilities, maintaining an interstate park, protecting against forest fires, maintaining adequate water supplies, controlling water pollution and protecting natural resources. And this is but a partial list of the present day responsibilities of compact agencies. As a committee of the National Association of Attorneys General has stated:

> " 'For the future—the growing needs and opportunities for intergovernmental cooperation probably will witness a continuing reliance on compacts, in terms of the numbers of such agreements and of the numbers of states affected, and in the variety of subjects with which they deal.' " Report of the Joint Legislative Committee on Interstate Cooperation, Vol. IV, N. Y. Legis. Doc. (1958) at p. 49.

It was pointed out by James F. Wright, Executive Director of the Delaware River Basin Commission, at the 1967 Muskie Committee Hearings on Creative Federalism that:

> "Matters once perhaps properly considered purely local in concern have become recognized as regional or national in their impact and have required expansion of policies and consideration of organizations which extend beyond state boundaries." Senate hearings before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, part 2-B, 90th Cong., 1st Sess. (1967) at p. 934.

Another commentator has recently stated:

> "the conditions which have brought about the creation of the most important interstate authorities to date are the product of increased urbanization—the result, in short, of the growth of metropolitan areas in this country. It is not mere coincidence that the

granted in this case. A half century ago there was not a single agency in the United States created by interstate compact. The first such agency was The Port of New York Authority created by interestate compact in 1921. New Jersey is a party to ten of these compacts.[1] Interstate

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Palisades Interstate Park Commission	New Jersey, New York	50 Stat. 719 (1937)
Atlantic States Marine Fisheries Commission	Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Virginia	56 Stat. 267 (1942)
Waterfront Commission of New York Harbor	New Jersey, New York	67 Stat. 541 (1953)
Tri-State Transportation Commission	Connecticut, New Jersey, New York	75 Stat. 170 (1961)
Delaware River Basin Commission	New York, New Jersey, Delaware, Pennsylvania, United States	75 Stat. 668 (1961)
Delaware River and Bay Authority	Delaware, New Jersey	76 Stat. 560 (1962)

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> " 'For the future—the growing needs and opportunities for intergovernmental cooperation probably will witness a continuing reliance on compacts, in terms of the numbers of such agreements and of the numbers of states affected, and in the variety of subjects with which they deal.' " Report of the Joint Legislative Committee on Interstate Cooperation, Vol. IV, N. Y. Legis. Doc. (1958) at p. 49.

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Another commentator has recently stated:

> "the conditions which have brought about the creation of the most important interstate authorities to date are the product of increased urbanization—the result, in short, of the growth of metropolitan areas in this country. It is not mere coincidence that the

> first interstate authority to be created in the United States was the Port of New York Authority, or that the Port of London Authority was its predecessor. Both were brought into being in order to solve problems arising in rapidly growing urban areas. The same is true of the Bi-State Development Agency and the proposed Delaware River Basin Commission. Today, the steadily and rapidly growing concentration of two-thirds of the nation's population into 192 metropolitan areas is perhaps the most dramatic event on the American scene, and unless all the prognostications about future population growth in the United States are wrong, the future holds only a tinuation of the process." Leach, "Interstate Authorities in the United States," 26 Law & Contemp. Probs. 666, 678 (1961).

If this necessary instrument of social growth in our federal system is to continue facilitating the solution to multistate problems, it is necessary that the compacts which delineate the obligations of compacting states to each other not be violated, and that this Court assume its rightful obligation as the ultimate arbiter of the relatively few controversies that might arise between the States as to the interpretation and enforcement of such compacts.

As this Court itself stated in *Dyer* v. *Sims*, 341 U. S. 22, 28 (1951):

> "But a compact is after all a legal document. Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift. Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts."

Thus, the Supreme Court is the final arbiter of a compact's terms.

Julius Henry Cohen, the Port Authority's first general counsel, indicated in his autobiography that an authority to be effective must be based on a *binding* interstate compact.

> "It was clear that New York and New Jersey had to be brought into *binding* cooperation. Hence, there would have to be a compact between the two." Cohen, They Builded Better than They Knew, 290 (1946).

Without this Court to prevent it, a legislature or the courts of one state could unilaterally change the previously agreed upon policy of two states under a compact and not only dispose of interstate property but defeat the basic policy supporting the compact. In the case *sub judice* involving the Port of New Jersey and New York, the largest economically integrated area in the entire country serving a population of over 12,000,000 people, the New York Court of Appeals incredibly has attempted to do exactly that and unless this Court intervenes, the effect will be to inhibit the State of New Jersey from further cooperative efforts with New York under the Compact in fear of future unilateral breaches and subversion of these efforts.

In this case the judgment of the New York Court of Appeals constitutes a flagrant breach of compact, thereby subverting the basic public policy behind the action of the State of New Jersey in agreeing with the State of New York that The Port of New York Authority, their joint agency should acquire the Hudson Tubes Railroad. New Jersey's public policy is clearly set forth in the agreement with New York which provides that the portion of the Hudson Tubes Railroad physically located within New Jersey must

be valued according to New Jersey principles of valuation law, and that under no "circumstances whatsoever" shall the condemnee be awarded any "increment" above the minimum amount of just compensation required by the Constitutions of the United States, New Jersey and New York for this railroad which is physically located in both States.

In the view of your *amicus* the most casual perusal of the New York Court of Appeals opinion makes it crystal clear that the Court did not even endeavor to make a good faith attempt to perform these compact provisions. Judge Burke in his dissenting opinion was moved to characterize the decision of the New York Court as "lip service to the mandate it [the Court of Appeals] is under to determine the award for the New Jersey property here in question under the requirements of the New Jersey and Federal Constitutions." 20 N. Y. 2d 457, 481.

New Jersey believes that there exists no Constitutional requirement or countervailing reason of public policy which can in any way justify the action of the New York Court of Appeals in ignoring the express terms of the very bi-state agreement which gave it jurisdiction to value property located in both New Jersey and New York. New Jersey submits that it is vital to the future of our federal system that the integrity of interstate agreements be safeguarded. Under the facts of this case, this can only be achieved if this Court reviews the decision of the New York Court of Appeals. The Court by granting such review will show that it will scrupulously enforce the specific terms of interstate compacts and will thereby discourage states who are parties to such compacts from ignoring, as New York did here, the express terms of these compacts and will thus accord such compacts the respect to which they are entitled under the Federal Constitution.

POINT II

The vital federal interest and policy in preserving mass transit facilities will be seriously impaired if the enormous windfall award granted by the New York Court of Appeals stands unreviewed and uncorrected.

The urban America of tomorrow must today come to grips with the problem of mass transportation. Efficient and comfortable mass transit systems have become an increasingly important national concern. The grave financial problems of our railroads are now the focus of considerable public attention.

In 1964, Congress passed the Urban Mass Transportation Act to assist states, local public bodies and their agencies in the preservation of viable mass transportation systems. 49 U.S.C. §1601 *et seq.*[1] This legislation is based

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[1] As early as 1920 Congress recognized "in a general sense the broad national interest in 'adequate transportation' ". Weissman, "Railroad Abandonments: The Competitive Ideal," 43 Minn. L. Rev. 251, 254 (1958). The Transportation Act of 1920 imposed upon the Interstate Commerce Commission a basic responsibility for assuring an adequate *national* railway system. 41 Stat. 456 (1920). See *Wisconsin Commission* v. *Chicago B & Q Railroad*, 257 U. S. 563, 585 (1922). In the Transportation Act of 1940, Congress declared there was a national concern and intention to "promote safe, adequate, economical, and efficient service." 54 Stat. 898 (1940). In 1958, Congress reiterated its view that the problems of America's railroads were national and regional in scope and that the problems were incapable of being solved locally. The Act granted the Interstate Commerce Commission, when requested by the carrier, jurisdiction over the discontinuance of any train service crossing state lines and it greatly reduced state jurisdiction over wholly intrastate operations. 72 Stat. 568. Finally, in 1967, the Federal Government established the Department of Transportation to give mass transit problems a voice at the highest level.

upon Congress' recognition, recited in the act, that the welfare of the bulk of the Nation's population, which is located in rapidly expanding metropolitan areas often spanning the boundaries of State and local jurisdictions, is being undermined by a general inadequacy of transportation facilities and services. The act seeks to assist in the development of improved mass transportation facilities, equipment, techniques and methods; to encourage the planning and establishment of area-wide urban mass transportation systems needed for economical and desirable urban development; and to provide assistance to State and local governments and their instrumentalities in preserving such systems. In 1966, Congress amended its Urban Mass Transportation Act to increase the amount of federal monies available for mass transit systems. 80 Stat. 715.

It is readily apparent that the vital federal interest in the preservation of urban mass transit facilities which Congress recognized, is jeopardized by the Court of Appeals' ruling. That ruling, by changing "the only invariable principle of valuation in condemnation proceedings"[1] as to what constitutes just compensation, has a direct bearing on the utilization of federal funds available to state and local public bodies under the Urban Mass Transportation Act. That act specifies that Federal monies cannot be utilized by "any State or local public body" for the acquisition of privately-owned transit facilities "unless . . . *just and adequate compensation* will be paid to such companies for acquisition of their franchises or property *to the extent required by applicable State or local laws.*" 49 U.S.C. §1602(c). (Emphasis added.)

Application of the Urban Mass Transportation Act in the light of the decision below would result in the payment of

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[1] *Spitzer* v. *Stichman,* 278 F. 2d 402, 410 (2d Cir. 1960).

excessive compensation for the acquisition of unprofitable transit enterprises, thereby limiting the beneficial use of public funds—both Federal and local—available for the preservation of mass transit facilities.

In addition, the New York Court of Appeals' decision could well force state and local governments, because of financial reasons, to allow essential privately-owned insolvent transit facilities to grind to a halt (because of lack of funds) rather than pay the owners of such facilities sums well in excess of the economic worth of their enterprises—sums predicated solely upon the public need. Once a transit system has ceased operations because of a lack of funds, a public agency could then acquire the physical assets of the defunct facility on a liquidation basis without paying a large windfall to speculators. The public, of course, will be the loser since it will be forced to suffer the discomforts inherent in allowing a mass transit facility to run itself into the ground.

This Court is certainly familiar with the financial problems faced by the nation's commuter railroads. See *Penn-Central and N. & W. Inclusion Cases,* 36 U. S. L. W. 4093 (decided January 15, 1968.) Both the New Haven Railroad which was involved in the *Penn-Central* litigation and the Hudson Tubes Railroad which is involved in this case, provide essential passenger transportation services though both are concededly inherently incapable of profitable operation. On October 31, 1967, the New York Court of Appeals in this case valued the Hudson Tubes Railroad on the basis of its essentiality to the public, whereas two weeks later the Interstate Commerce Commission employed an entirely different standard when it valued the New Haven Railroad on a liquidation basis. The Commission held that since the New Haven Railroad was an unprofitable operation, liquidation value constituted "just and ade-

quate compensation." *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.*, I. C. C. Finance Docket No. 21989, p. 115, decided November, 1967.

Five separate groups of creditor interests are now relying upon the New York Court of Appeals' decision in this case to challenge the correctness of the Interstate Commerce Commission's valuation of the New Haven Railroad See footnote p. 4, *supra*. This challenge is being made before a three-judge statutory court. Thus, for example, in *Oscar Gruss & Son* v. *United States and Interstate Commerce Commission*, (S. D. N. Y. 68 Civ. 345) the complaint which was filed on January 25, 1968 emphasizes (p. 10) that:

> "In so holding, the Commission flatly contradicted—and apparently disregarded—the decision of the New York State Court of Appeals in Matter of Port Authority Trans-Hudson Corporation."

Similarly, in *United States Trust Co.* v. *United States and Interstate Commerce Commission*, (S. D. N. Y. 68 Civ. 344) it is urged that the Interstate Commerce Commission erred in failing

> "* * * to give any consideration in its valuation of the New Haven to reproduction cost or going concern value and in so doing completely disregarded the decision of the Court of Appeals of the State of New York *In Matter of Port Authority Trans-Hudson Corporation*, 20 N. Y. 2nd 457, 231 N. E. 2d 734 (1967)." Complaint filed January 24, 1968, p. 11.

Since an appeal from a three-judge district court comes directly here, it seems apparent that this Court will ultimately have to pass upon the correctness of the Court of Appeals' ruling in this case. In all likelihood the New

Haven matter will come before this Court either late this Spring or early next Fall. Accordingly, the decision below involves an important national issue of current urgency—an issue which New Jersey believes needs to be decided by this Court now.

POINT III

The vital interest of New Jersey in the problems of its commuters is subverted by the New York Court of Appeals decision.

The State of New Jersey has long been confronted with the problems engendered by railroads operating with overall net losses who wish to discontinue operation of passenger service and "the problems involved in regulating New Jersey's passenger railroads are representative of those encountered in other states." Thomas, "Public Utilities: Discontinuance of Railroad Service," 14 Rutgers L. Rev. 345 (1960).

By authorizing condemnation of the Hudson Tubes Railroad by the Port of New York Authority or its subsidiary, the States of New Jersey and New York found a means of preserving a much needed mass transit facility. Without such means this hopelessly unprofitable passenger-service-only railroad would, in a short period of time, have been forced to abandon operation. Such action by the railroad would have been Constitutionally permissible and could not have been prevented by the State of New Jersey. Such discontinuance would have left with major commutation problems the approximately 30 million annual New Jersey commuters who use the railroad. These problems may have remained insoluable in view of New Jersey's fiscal inability to solve them in any other meaningful way than the solution reached,—namely, condemnation under the estab-

lished New Jersey-Federal-New York valuation principle which looks to the prior owner's economic loss to determine value.

But an answer was found—the use of an interstate agency to operate an interstate commuter facility. However, after arriving at this solution the State of New Jersey should not be penalized by being forced to have its joint agency with New York pay a large windfall to the Hudson Rapid Tubes Corporation which owned this railroad for approximately 8 months prior to condemnation. The financial interests which control the Hudson Rapid Tubes Corporation are the former creditors of the railroad who wiped out its former equity owners in the reorganization proceeding. In view of New Jersey's current budget crisis our legislature may well reconsider New Jersey's position of utilizing interstate compacts for the solution of interstate transportation problems if the immense windfall award of the New York Court of Appeals is allowed to stand.

Certainly there is a vital national, as well as regional interest in the continued operation by an interstate agency of a hopelessly unprofitable interstate railroad essential to the public's welfare and the proper valuation in condemnation of such a railroad pursuant to an interstate compact raises a substantial Federal question.

New Jersey is of the firm opinion that the New York Court of Appeals' decision interpreting and enforcing the Compact between New Jersey and New York adversely affects: (a) the regional and national interest in the solution of this problem by means of an interstate compact, (b) other possible solutions to the mass transit problem under the Urban Transportation Act and (c) the solution to the numerous other urban problems currently facing New Jersey and New York as well as other states in the nation by means of congressionally sanctioned interstate compacts.

CONCLUSION

In light of the foregoing, New Jersey respectfully submits that this Court should grant a writ of certiorari in this case.

Respectfully submitted,

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Proof of Service

I, JOSEPH A. HOFFMAN, First Assistant Attorney General of the State of New Jersey and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of February, 1968, I served copies of the foregoing brief on Hudson Rapid Tubes Corporation and on Port Authority Trans-Hudson Corporation, by mailing a copy in a duly addressed envelope with first-class postage pre-paid, to each of the following in this cause:

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JOSEPH A. HOFFMAN

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. , Original

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK and
HUDSON RAPID TUBES CORPORATION, a corporation of the State of Delaware,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

Statement

This brief is submitted by the State of New Jersey in support of its motion for leave to file a complaint against the State of New York and the Hudson Rapid Tubes Corporation, a citizen of the State of Delaware. The complaint seeks to prevent the State of New York from fur-

ther breaching New Jersey's rights under a Compact[1] between the States by enforcing a judgment in favor of the corporate defendant made by the New York courts in violation of said Compact hereafter referred to as the "Agreement".

There can be no question but that this Court possesses original jurisdiction over this suit by New Jersey against New York and a citizen of Delaware. In an identical situation, this Court granted Pennsylvania's motion for leave to file its bill of complaint against New Jersey as well as against individually-named defendants. *Pennsylvania* v. *New Jersey, et al.*, 309 U. S. 628 (1940). In that case, discussed in detail below, Pennsylvania contended that a decision by the New Jersey courts violated a compact between the States by requiring an interstate agency, contrary to the compact, to pay damages to private litigants.[2] Pennsylvania named the private litigants together with New Jersey as defendants in its original action. The basis for this Court's jurisdiction there, as it is here, is Article III of the Constitution which expressly provides that "the supreme Court shall have original Jurisdiction" "in all Cases . . . in which a State shall be Party" and that "The judicial Power of the United States" shall

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[1] Ch. 8, Laws of N. J., 1962; Ch. 209, Laws of N. Y., 1962. This legislation constitutes an agreement between the States amendatory of and supplemental to the Port Compact and Comprehensive Plan, Ch. 151, Laws of N. J., 1921; Ch. 154, Laws of N. Y., 1921; Ch. 9, Laws of N. J., 1922, Ch. 43, Laws of N. Y., 1922; consented to by Congress, Pub. Res. 17, Ch. 77, 67th Cong., 1st Sess. (1921), 42 Stat. 174; Pub. Res. 66, Ch. 277, 67th Cong., 2nd Sess. (1922), 42 Stat. 822.

[2] The case was never decided on its merits—see 310 U. S. 612—since Pennsylvania's rights under the compact were vindicated when this Court reversed the decision of the New Jersey courts in *Delaware River Toll Bridge Commission* v. *Colburn*, 310 U. S. 419 (1940).

extend "to Controversies between two or more States" as well as to those "between a State and Citizens of another State."

This brief demonstrates not only that this Court possesses original jurisdiction over this action but also that it has recognized its affirmative duty to decide controversies which, like the present one, relate to the interpretation and enforcement of interstate agreements. Further, since New Jersey has a vital independent interest in having the Agreement to which it is a party performed according to its terms, it cannot rely at this time for the protection of its rights upon a forthcoming petition for a writ of *certiorari* which will be submitted to this Court on behalf of the Port Authority Trans-Hudson Corporation (PATH), a wholly owned subsidiary of its joint agency, The Port of New York Authority.[1] In that petition this Court will be asked to review the decision of the New York Court of Appeals under the Agreement.

Specifically, New Jersey has brought this action to establish its rights under two provisions of its Agreement with New York. The Agreement between the States authorized the Port of New York Authority (acting either directly or through a wholly owned subsidiary corporation) to acquire a severely deteriorated, deficit-ridden interstate commuter railroad, 65% of which is located in New Jersey, and which was then on the verge of abandonment by its private owner who had eagerly sought public acquisition of the facility. The Agreement specified that in valuing the railroad, the "courts of the forum state [New York] shall apply the laws of valuation of the other state [New Jersey] . . . to the valuation of the

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[1] General Counsel for The Port of New York Authority, Sidney Goldstein, Esq., has notified the State that his agency will file such a petition.

property [65%] which is located . . . in the non-forum state." Additionally, the Agreement provided that the condemnee "shall not be awarded . . . any increment above the just compensation required by the Constitutions of the United States and of the state or states in which the property is located . . . by reason of any circumstances whatsoever."

Despite these provisions, the highest court of New York State *expressly* refused to follow New Jersey condemnation law in valuing that portion of the railroad located in New Jersey. The New York court based its condemnation award for the entire railroad upon the alleged gain to the taker resulting from the condemnation even though every decision of the New Jersey courts (under the New Jersey Constitution), every decision of this Court (under the United States Constitution) and every *prior* decision of the New York courts (under the New York Constitution), has, without any exception whatsoever, held that a condemnation award must be based solely on economic loss to the condemnee. Indeed, the United States Court of Appeals for the Second Circuit has said in reference to this very railroad:

> "The only invariable principle of valuation in condemnation proceedings is that the award should reflect what the owner has lost; the criterion is not what the taker has gained. Roberts v. New York City, 1935, 295 U. S. 264, 282, 55 S. Ct. 689, 79 L. Ed. 1429. In the absence of a market value, this may properly be determined by what the property 'brings in the way of earnings to its owner.' Monongahela Navigation Co. v. United States, 1893, 148 U. S. 312, 328, 13 S. Ct. 622, 627, 37 L. Ed. 463. Where the property is incapable of producing earnings, 'junk value' may be appropriate."[1]

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[1] *Spitzer* v. *Stichman*, 278 F.2d 402, 410 (2d Cir. 1960).

It is New Jersey's position in this litigation that the decision of the New York Court of Appeals violates in three crucial respects the express terms of the Agreement between the States. Primarily, it ignores the mandate of the Agreement to apply New Jersey law to that portion of the condemned railroad (65%) which is located in New Jersey. Second, it ignores the mandate of the Agreement that no "increment" above the just compensation required under the Constitutions of the United States, New Jersey and New York be paid for the railroad "by reason of any circumstances whatsoever". And third, it ignores the manifest intent of the two States that the previously well-settled rules of just compensation valuation (under the Constitutions of the United States, New Jersey and New York) be incorporated into their Agreement.

1. The long history of successful cooperation between the States of New Jersey and New York has been achieved only by the faithful performance of compact obligations by each of the two states.

The governmental problems faced by the States of New Jersey and New York in the development of the Port of New York District—the Nation's largest metropolitan region—are the direct result of the area's geography, of its tremendous concentration of population and commerce, and of its division into two States and over 200 separate local governments.

For a century, prior to 1917, the history of the region was one of unfortunate conflict between New Jersey and New York. Disputes early in the nineteenth century over harbor franchises, ferry rights and boundaries had brought the two States to the brink of war.[1] Those political and

[1] See *Gibbons* v. *Ogden*, 9 Wheat. 1, 184 (1824).

commercial rivalries were finally settled in the treaty of 1834 between New Jersey and New York.[1]

This treaty dealt solely with the technical and political questions of boundaries and territorial jurisdiction. The subsequent growth of the bi-State region, the increase in its population and its commerce, the coming of the railroad, and later of the automobile, created new social, and especially economic, problems calling for the exercise of governmental power. A railroad rate controversy between interests in New Jersey and those in New York resulted in the focal *New York Harbor* case, 47 I. C. C. 643 (1917). There the Interstate Commerce Commission emphasized that:

> "historically, geographically, and commercially New York and the industrial district in the northern part of the state of New Jersey constitute a single community." (47 I. C. C. at 739)

The Interstate Commerce Commission then stated that:

> "cooperation and initiative must eventually bring about the improvements and benefits which the complainants hope to attain through a change in the rate adjustment." (47 I. C. C. at 739)

Fortunately, before the decision in the *Harbor* case, an important constructive step had already been taken by the States to solve cooperatively the problems of their joint port. The New Jersey Legislature at the urging of Governor Walter E. Edge created a study commission to act cooperatively with a similar commission created by

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[1] Laws of N. J. 1833-34, p. 118, February 26, 1834; confirmed by Ch. 8, Laws of N. Y., 1834. This treaty was consented to by Congress on June 28, 1834, 4 Stat. 708.

New York to seek a solution to the many economic problems plaguing the Port District. As a precursor of the cooperation to come, the separate study commissions established by each State organized themselves as a single body, known as the New York, New Jersey Port and Harbor Development Commission.

The Commission rendered a massive 495-page report which urged the creation of a permanent interstate agency as the basic essential for the carrying out of a unified program of port development and improvement. Because of the governmental and political implications inherent in the proposed solution, the Commission recommended resort to the Compact Clause of the Constitution, which as Mr. Justice Brandeis has pointed out "adapts to our Union of sovereign States the age-old treaty making power of independent sovereign nations."[1] The implementing instrument to be utilized was the establisment of a regional and functioning port agency. Until this time the Compact Clause had lain dormant as a constructive governmental tool. It had been used only for the adjustment of state boundary disputes. Never before had it been employed as the springboard for a permanent operating interstate agency.

In 1921 the recommendations of the study Commission bore fruit when New Jersey and New York entered into an interstate compact which created a statutorily defined region known as the Port of New York District, an area roughly within a 25-mile radius of the Statue of Liberty, and established The Port of New York Authority, as the agency of both States, for the express purpose of developing the port district on a unified and cooperative basis. The Compact took the form of an amendment to the 1834 Treaty. It was passed by the Legislatures of both New

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[1] *Hinderlider* v. *LaPlata, R. & Cherry Creek Ditch Co.*, 304 U. S. 92, 104 (1938).

Jersey and New York and consented to by Congress.[1] In the Compact both States pledged

> "each to the other, faithful co-operation in the future planning and development of the port of New York." (Art. I)

The necessity for the creation of the new agency was well stated in the Compact, which declares that

> "a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the States of New York and New Jersey." (Preamble)

With impressive foresight the Compact pointed out that

> "The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money and the cordial co-operation of the states of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans." (Preamble)

The Compact's preamble concluded by stating that

> "Such result can best be accomplished through the co-operation of the two states by and through a joint or common agency." (Preamble)

The Compact went on to create The Port of New York Authority as a "body, both corporate and politic" (Art. III) as the joint agency of the States with power to effectuate the performance of the Compact. In prescient anticipation of the ever-evolving challenges to be posed

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[1] Ch. 151, Laws of N. J. 1921; Ch. 154, Laws of N. Y. 1921; Pub. Res. 17, Ch. 77, 67th Cong., 1st Sess., 1921, 42 Stat. 174.

by their bi-State port, the Compact provided that "the port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other." (Art. VII)

Pursuant to the Compact a Comprehensive Plan was adopted by both States as the blueprint for action by their joint and common agent. The Plan and the Compact, pursuant to their terms, have been supplemented and amended by subsequently enacted bi-State legislation. Acting under these statutes, the Port Authority has, over the almost half century of its existence, proceeded to develop, as the joint agent of both States, an impressive and vitally needed list of public facilities and programs. By the end of 1961 it owned or operated the following facilities: six interstate vehicular crossings—the George Washington, Bayonne and Goethals Bridges, the Outerbridge Crossing and the Holland and Lincoln Tunnels; four air terminals, Newark, Kennedy, LaGuardia and Teterboro Airports, and two heliports; six marine terminals, Port Newark, the Elizabeth-Port Authority Piers, the Hoboken-Port Authority Piers, the Brooklyn-Port Authority Piers, the Erie Basin-Port Authority Piers and the Grain Terminal and Columbia Street Pier; as well as four inland terminals, the Newark Motor Truck Terminal, the New York Motor Truck Terminal, the Port Authority Inland Terminal No. 1 and the Port Authority Bus Terminal.[1]

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[1] New Jersey and New York have also cooperated in solving other problems relating to their joint Port District. In 1953 they created (by another interstate compact between them to which Congress consented) the Waterfront Commission of New York Harbor in order to eliminate corrupt practices in the handling of waterborne freight within the Port of New York and to regulate the employment of waterfront labor. (Ch. 202, 203, Laws of N. J., 1953; Ch. 882, 883, Laws of N. Y., 1953; consented to by Congress, Pub. Laws 252, Ch. 407, 83rd Cong., 1st Sess. 1953, 67 Stat. 541).

At this juncture New Jersey wishes to emphasize that the above record of achievement was made possible only by the faithful cooperation of both States in honoring the obligations which each assumed to the other in the agreements between them.

2. The Agreement between the States of New Jersey and New York relating to the Hudson Tubes Railroad.

During the early 1950's the Nation's commuter railroads, including those within the New Jersey-New York Port District, began to experience severe financial problems. Railroad lines were seeking to curtail drastically and even to abandon established commuter rail services. Throughout the decade it became apparent that commuter rail transportation was inescapably a deficit operation. Many interrelated factors were responsible. The population dispersal to areas not served by fixed rail beds; the companion large increase in private passenger car usage; the dilemma of equipment needed only twice a day during the morning and evening peak periods and sitting idle in between; the 5-day work week; the growth of suburban shopping centers with adequate parking facilities; high operating expenses, particularly labor costs; obsolete and unattractive railroad cars; competition by modern air-conditioned bus lines which could more easily and economically follow the new centers of population expansion, etc.

In the late 1950's the financial condition of the commuter railroads serving the Port District had reached crisis proportions. This Court is fully familiar, for example, with the economic difficulties encountered by the New Haven Railroad. It was evident that both States had to take positive governmental action of both a single State and bi-State nature if adequate commuter railroad transportation for their citizens was to be maintained.

In 1959, at the request of the State of New York, New Jersey joined in an amendment to the 1921 Port Compact to permit the Port Authority to participate in a plan to aid the commuter railroads serving the New York side of the Port District. (Ch. 25, Laws of N. J., 1959; Ch. 638, Laws of N. Y., 1959). Under this plan—known as the Commuter Railroad Equipment Program—the Port Authority was authorized to proceed on behalf of the State of New York to purchase new railroad cars for lease to the Long Island Rail Road, the New York Central Railroad and the New Haven Railroad.[1]

The next year New Jersey passed legislation permitting the State to enter into "service contracts" with commuter railroads whereby the railroads would be paid, out of State funds appropriated for the purpose, a limited amount of money in partial offset of the deficits which were incurred in commuter operations. (Ch. 66, Laws of N. J., 1960). In return for these State funds the railroads would agree to maintain an adequate level of commuter operations. In practice this was a token program.

Of all the commuter railroads in New Jersey, the plight of the interstate Hudson Tubes railroad had long been the most severe and ominous. This 7.9 mile railroad operates between municipalities in New Jersey and the midtown and downtown business districts in Manhattan. So critical was its financial plight and so pressing the need for enormous capital improvements that New Jersey concluded that the limited amount of aid available under a "service contract" would not solve the Hudson Tubes' problems. Indeed, in 1962 the total appropriation available for service contracts for railroads in New Jersey

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[1] Under the aforesaid agreement, a similar equipment program is possible for New Jersey railroads if New Jersey so elects.

other than the Hudson Tubes was only $6,000,000—barely 27% of the $21,940,577 total deficit sustained from passenger service losses by these railroads. It was obvious therefore that if the Hudson Tubes was to remain in operation, a far reaching permanent solution would have to be found.

In 1954, the railroad's creditors had forced it into reorganization under the Bankruptcy Act on the ground of insolvency. The reorganization proceeding was designed to lay the groundwork for the railroad's ultimate abandonment by its private owners. This was to be achieved by separating the ownership of the railroad from the income-producing office buildings which were constructed over the railroad's downtown Manhattan terminal and which were owned by the same company that owned the railroad. For many years the deficits of the railroad had overrun the earnings from the real estate.

Out of the reorganization proceeding two corporations emerged—a real estate company owning the only productive asset of the old railroad company, the office buildings at 30 and 50 Church Street in Manhattan; and a railroad company, the defendant, Hudson Rapid Tubes Corporation (HRT). The reorganization court gave HRT only $500,000 in cash with which to continue operations. The court believed that with all existing debts wiped out and no program for even necessary capital improvements this sum would "provide working capital . . . for a period of two years." *In Re Hudson & Manhattan Railroad Co.*, 174 F. Supp. 148, 170 (S. D. N. Y. 1959). It was thus apparent that unless governmental intervention occurred the railroad would soon be forced to cease operations because of a lack of money; in addition, the railroad's physical condition would further deteriorate to a point where it would be unsafe.

In the first opinion rendered in the reorganization proceeding, *In the Matter of Hudson & Manhattan R.R. Co.*, 138 F. Supp. 195 (S. D. N. Y. 1955) the Federal Court pointed out that the railroad's

> "prospects were not improving but on the contrary were getting worse. It had consistently failed to earn its expenses and interest for several years." (138 F. Supp. at 201)

After describing the railroad's bleak financial status, the Federal Court also commented upon the

> "urgent need to replace its rolling stock. * * * All of its cars were old, its most recent acquisitions being 20 cars which were acquired in 1928. On December 31, 1954, * * * over half of its then active fleet of 273 cars had been acquired between 1909 and 1911." (*Id.* at 202)

In addition, the court noted that the railroad's "black cars have not had the regular class repairs required by sound railroad practice and now require excessive maintenance." (Ibid.)

The reorganization plan which was recommended to the Federal Court by the railroad's trustee was based on the conviction that the road was hopelessly insolvent and that continuation of the railroad was inherently a deficit operation. The principal proposals of the trustee were that all stockholder interests, both common and preferred, should be wiped out and that the railroad operation be severed from the buildings in order to prevent the deficits of the former from causing the financial ruin of the latter.

The Securities and Exchange Commission rendered an advisory report to the reorganization court pursuant to Section 173, Chapter X of the Bankruptcy Act, recommending approval of the proposed reorganization plan

as fair and feasible. *In the Matter of Hudson & Manhattan R.R.*; 38 SEC 676 (1958). The SEC report stated:

> "it is our view that the assets to be acquired by the Railroad Company should be valued for purposes of testing the feasibility and fairness of the amended plan at not in excess of $3,500,000." (38 SEC at 708)

Both the State of New Jersey and its Board of Public Utility Commissioners, as well as the stockholder interests (which would be wiped out by the proposed reorganization plan) objected to its approval. New Jersey and its Board of Public Utility Commissioners argued that the reorganization plan was "tantamount to an abandonment of the railroad" since

> "To remain in active service the railroad operation must continue to receive the support of the real estate operation." *In the Matter of Hudson & Manhattan Railroad Co.*, 174 F. Supp. at 170.

The stockholders for their part contended that

> "they should get some type of security which would give them an interest in the property in the event that future developments * * * would justify a value greater than can reasonably be found to be the value of the Debtor's properties, or can reasonably be anticipated from earnings that now can be developed from such properties." (174 F. Supp. at 151)

The Federal District Court overruled these objections and the stockholders appealed to the United States Court of Appeals for the Second Circuit. That court affirmed the decision below, *sub nom., Spitzer* v. *Stichman,* 278 F.2d 402 (1960). In rejecting the stockholders' argument

that the railroad possessed commercial value because of the likelihood that it might be condemned by a public agency for continued operation, the Second Circuit observed:

> "The only invariable principle of valuation in condemnation proceedings is that the award should reflect what the owner has lost; the criterion is not what the taker has gained. Roberts v. New York City, 1935, 295 U. S. 264, 282, 55 S. Ct. 689, 79 L. Ed. 1429. In the absence of a market value, this may properly be determined by what the property 'brings in the way of earnings to its owner.' Monongahela Navigation Co. v. United States, 1893, 148 U. S. 312, 328, 13 S. Ct. 622, 627, 37 L. Ed. 463. Where the property is incapable of producing earnings, 'junk value' may be appropriate." (278 F. 2d at 410)

It was in the light of these facts and principles that the States of New Jersey and New York had to decide whether they should permit the Hudson Tubes railroad to cease operations when its meager funds were exhausted. Although the railroad's annual passenger traffic had steadily declined over the years from more than 133 million in 1927 to 31.5 million in 1961, a decrease of over 70%, the States, nevertheless, believed that the railroad still had an important role to perform in providing mass transportation for the New Jersey-New York metropolitan region. Since the problem was clearly a bi-State one, and since the two States determined that their joint agency, the Port Authority, was capable of absorbing the anticipated annual, capital and operating deficits of the railroad without jeopardizing its ability to fulfill its other needed public functions, they directed it to undertake the operation of this commuter facility. To do this, the States enacted concurrent legislation amending and supplementing

their 1921 compact creating the Port Authority to provide for the acquisition of the Hudson Tubes railroad by the Port Authority acting either directly or through a subsidiary corporation.[1] (Ch. 8, Laws of N. J., 1962; Ch. 209, Laws of N. Y., 1962).

Although the two States were satisfied that the anticipated deficits of the Hudson Tubes would be absorbed through the medium of the Port Authority's General Reserve Fund in which the revenues derived from the Authority's other facilities are pooled, the States were nevertheless anxious not to strip the agency of the ability to proceed with the needed development of other facilities for which it was responsible. The key to this objective was to avoid impairing the credit of its agency.[2] The formula which the two States adopted to solve this problem was written into the Agreement. In general terms, the formula provides that no new railroad facilities may be undertaken by the Port Authority at any time, if the anticipated average annual transit deficits, including those of the Hudson Tubes, exceed 10% of the amount then in the Authority's General Reserve Fund. The Statement which accompanied the introduction of the authorizing legislation in New Jersey assured the members of the Legislature that the Bill provided "for the protection of Port

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[1] The States thus exercised the power of amendment which they had expressly reserved to themselves in their 1921 compact—a power which received the specific approval of Congress when it consented to the 1921 Agreement. The constitutionality of the 1962 legislation was upheld in *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority,* 12 N. Y. 2d 379, *appeal dismissed for want of a substantial Federal question,* 375 U. S. 78, *rehearing denied,* 375 U. S. 960 (1963).

[2] The Authority has been given no power of taxation nor any right to pledge the credit of either State in support of bonds issued in connection with its facilities.

Authority credit by spelling out to what extent further deficit commuter railroads can be added to Port Authority operations."

Since the railroad is physically situated in both States, the States in their Agreement provided that the railroad properties could be condemned in a single condemnation proceeding in the State wherein PATH determined that the majority in value of the property was located.[1] However, the Legislatures were careful to include two protective provisions in their Agreement with respect to such a condemnation proceeding. Both provisions are found in Section 14 of the Agreement and it is to prevent the breach of these covenants that New Jersey has commenced this action. The first provides that:

> "In any such [condemnation] action or proceeding the court or courts of the forum State shall apply the laws of valaution of the other State (hereinafter sometimes called the nonforum State) to the valuation of the property which is located or has its situs in the nonforum State."

And the second specifies that:

> "The owner of any property acquired by condemnation or the exercise of the right of eminent domain for any of the purposes of this act shall not be awarded for such property any increment above the just compensation required by the constitutions of the United States and of the State or States in which the property is located or has its situs by reason of any circumstances whatsoever."

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[1] Sections 12 and 14 of the Agreement. By resolution dated June 14, 1962, PATH determined that the greater part in value of all the property to be condemned—the railroad owned by the corporate defendant and the two office buildings located over the railroad's downtown terminal in Manhattan—was in the State of New York. The office buildings had been valued at $16 million in the Federal reorganization proceeding. The condemnation award for the office buildings is not an issue in this litigation.

The latter provision, as does the express statutory limit on future railroad deficit involvement, demonstrates the clear concern of the contracting parties that the extent of the strictures on port development inherent in the transit deficits imposed on their agency should be held to an absolute minimum.

3. The breach by the defendants of the 1962 Agreement between the States of New Jersey and New York relating to the Hudson Tubes Railroad.

Pursuant to the terms of the Agreement between the States, The Port of New York Authority, through its wholly-owned subsidiary, The Port Authority Trans-Hudson Corporation (PATH), instituted condemnation proceedings in the condemnation part of the New York State Supreme Court on June 28, 1962. On the return date of the petition HRT's then President urged on the condemnation court the necessity of having PATH immediately take over the railroad's operations:

> "It is no longer possible for us, sir, to find the money with which to replace our signal system, and it is time that it was done. It is impossible, sir, for us to find the money to replace our power system which it is essential be done.
>
> "It is impossible, sir, in view of the competition —they have done a great job in bringing people over —but it is impossible for us to find the funds with which to replace our antiquated car equipment which in some cases is older than that of the city transit system. Some of it is forty or even fifty years old.
>
> * * *
>
> "It is essential to the safety of the more than 100,000 passengers who ride the road each day between New York and New Jersey that something be done. We can not do it. We have not got the funds.
>
> * * *

> "It is essential that there be no delay if we are to carry on a safe operation. You may say you are running an unsafe railroad. Not at all, sir, but when these bankruptcy proceedings were pending in the Federal Court in the Southern District of New York before Judge Walsh, he required of me by an order in his chambers to replace certain of our old cars, fifty of them, which we did, as I say, in association with the Pennsylvania Railroad, because he found it was necessary for a safe operation.
>
> "Now today we are safe, sir, but in view of the condition of our signal system, in view of the condition of our equipment, I can not tell you what might happen in the next ten days or thirty days. We are running as best we can." (Official Transcript of Proceedings before Mr. Justice Quinn, July 24, 1962, pp. 43, 44, 45.)

The condition of the railroad described by its president to the condemnation court was also recognized by the Interstate Commerce Commission in its granting of a Certificate of Public Convenience and Necessity to PATH on August 24, 1962.

> "If the Port Authority, through [PATH], is willing to take over the operation of the line for the benefit of the metropolitan area population of New Jersey and New York, knowing that the operation will probably continue to incur deficits, it should be permitted to do so. In view of the present operating deficits, it is doubtful that the operation of the line could long continue otherwise."

In December, 1965, the condemnation court ruled that the defendant HRT was entitled to an award of $55 million. *Matter of Port Authority Trans-Hudson Corp.*, 48 Misc. 2d 485 (Sup. Ct. N. Y. Co. 1965). The trial court found this

extraordinary $55 million value for a railroad which all concede was; as stated by the New York Appellate Division, "inherently incapable of profitable operations." It did so by utilizing the original cost of the tunnel portion of the railroad, approximately $30 million, and then adding to the $30 million an additional $20 which allegedly represented the depreciated balance of the remainder of the railroad's property. To this $50 million figure, the court added an additional 10% for good measure on the ground that this adequately reflects the railroad's going concern value to the taker. Thus, a $55 million award was made for a railroad which admittedly was a liability rather than an asset in the hands of its former owners!

The court completely ignored the following two facts of public record.

(1) The railroad reported operating losses of more than $2.7 million during the five years immediately preceding condemnation; and

(2) The railroad had been valued by the SEC at $3.5 million.

The trial court's rationalization was that the $55 million award was required because the railroad was condemned for continuation in use. By pegging its award on the fact that the railroad was to be continued in use, the trial court breached the bi-State Agreement that no "circumstances whatsoever" were to result in an "increment" to the owner over "just compensation." In fact, the trial court did not even mention this Agreement provision.

The most incredible aspect of the trial court's decision was its failure, anywhere in its 51 page opinion, to cite a single New Jersey condemnation case even though 65% of the railroad is physically located in New Jersey and the Agreement expressly provides that:

> "In any such [condemnation] action or proceeding the court or courts of the forum state shall apply the laws of valuation of the other state (hereinafter sometimes called the nonforum state) to the valuation of the property which is located or has its situs in the nonforum state."

The answer to the Court's omission of New Jersey citations may be that there is no conceivable way in which New Jersey condemnation law can be squared with the trial court's ruling. The leading New Jersey case on the subject, *Currie* v. *Waverly & N.Y.B. R.R.*, 52 N. J. L. 381, 395-96 (Ct. Err. & App. 1890), states the rule as follows:

> "It is for the owner's deprivation of any existing value that he is to be compensated. Neither the individual advantages to the party acquiring the land, nor the necessity of its acquisition, can be considered in computing the loss of the land to the owner * * *."

The trial court's ruling is the exact opposite of what the highest court of New Jersey stated New Jersey law to be. The trial court was concerned solely with the supposed advantages to the public and not as it should have been with the owner's economic loss. *Currie* has been repeatedly cited with approval by New Jersey's courts from 1890 to date. Our courts in New Jersey are in accord with and rely upon the rulings of this Court in valuing condemned property. Thus, in *State* v. *Burnett*, 24 N. J. 280, 288 (1957), the present New Jersey Supreme Court said:

> "the constitutional requirement is satisfied by a sum of money which fairly represents the transferable value of the property in the market place."

In support of this statement, the highest court of New Jersey cited two decisions of this Court, *Olson* v. *United States,* 292 U. S. 246 (1934), and *Kimball Laundry Co.* v. *United States,* 338 U. S. 1 (1949), adopting their holdings as the law of New Jersey. In the *Olson* case this Court declared that

> "The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain. *Vogelstein & Co.* v. *United States,* 262 U. S. 337, 340. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. *He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and federal constitutions. Minnesota Rate Cases,* 230 U. S. 352, 454-55." (292 U. S. at 254-55) (Emphasis added.)

And in *Kimball* this Court succinctly stated:

> "[T]he value of specially adapted plant and machinery exceeds its value as scrap only on the assumption that it is income-producing." (338 U. S. at 9)

Moreover Special Term's $5 million award for going concern value is contrary to New Jersey law. *State* v. *Gallant,* 42 N. J. 583, 587 (1964). Indeed, even in states where the going concern value approach is commonly utilized for valuing "profitable enterprises" its function is to aid in the determination of loss to the owner. Thus, consideration of going concern value as enhancement of value to the taker is not only contrary to New Jersey law but is a misapplication of the principle itself.

PATH appealed from the trial court's award to the Appellate Division (First Department) of the New York Su-

preme Court. That court in accord with both the mandate of the Agreement and well-settled New Jersey, New York and Federal law reduced the $55 million award to $3.5 million for the railroad, representing its economic value. *Matter of Port Authority Trans-Hudson Corp.*, 27 A. D. 2d 32 (1st Dept. 1966).

The defendant HRT appealed to New York's highest court, its Court of Appeals. That court in an opinion by Judge Kenneth Keating overturned the Appellate Division's decision despite the fact that the majority opinion admits that "the traditional rule which has evolved in condemnation cases . . . is that just compensation requires only that the condemnee be paid for what he has lost and not for what the taker has gained." *Matter of Port Authority Trans-Hudson Corp.*, 20 N. Y. 2d 457, 467 (1967).

The majority in the Court of Appeals reasoned that since the railroad was "condemned for continued dedication to the same use to which the owner had dedicated the property," it did not have to abide by "the traditional rule." The Court of Appeals thus, in effect adopted the approach enunciated by the trial court. This conclusion is particularly surprising in light of the mandate of the Agreement between the States that the condemnee was not to be awarded any "increment" above the Constitutionally required just compensation. In effect, the States wrote into their Agreement the well-settled principles of just compensation law that had previously been enunciated by the highest courts of New Jersey and New York, as well as by this Court. And it was this very Agreement which permitted the continuing use of the taken property. We, therefore, are faced with the contradiction that the States' underlying and motivating purpose is distorted by judicial amendment into a self-defeating mechanism for thwarting their Agreement which explicitly specifies that no circum-

stances shall produce an excessive condemnation award.[1] The majority did not even so much as refer to the valuation ceiling in the Agreement between the States although both the State of New Jersey and PATH, in their respective briefs, brought it forcefully to the Court of Appeals' attention.

Instead, the Court of Appeals' majority evaded the mandate of this provision, as well as the provision requiring the application of New Jersey law to the property located in New Jersey by stating that this case was "*sui generis* and . . . requires an approach different from that generally followed." (20 N. Y. 2d at 472) It awarded $30 million for

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[1] The clear bi-State legislative intent behind this provision was the same as that of the comparable provision contained in the Act of Congress involved in *United States* v. *Cors,* 337 U. S. 325 (1949)—"in no case was the value of the property taken or used [by the government] to be deemed enhanced by the causes necessitating the taking or use." This Court held that this statutory provision was "coterminous" with the Constitutional requirement of just compensation pointing out that both the statute and the Constitution "exclude[s] enhancement of value resulting from the government's special or extraordinary demand for the property." (337 U. S. at 333) This Court noted that "The special value to the condemnor * * * has long been excluded as an element of market value." (337 U. S. at 333) It went on to say:

> "It is not fair that the government be required to pay the enhanced price which its demand alone has created. * * * [T]he enhanced value reflects speculation as to what the government can be compelled to pay. That is a hold-up value not a fair market value." (337 U. S. at 333-34)

Obviously the decision of the Court of Appeals breached the Agreement in basing its condemnation award on the public's continued need for the railroad. As stated in *Cors* such an award is not "just compensation" but rather, is a forbidden "hold-up" value.

the railroad's tunnels—and remanded the rest of the case for further proof as to the value of the other railroad property condemned, including a possible amount for so-called "going concern value" to the taker.

Judge Adrian P. Burke delivered a persuasive dissent in which he argued that the majority by disregarding well-established principles of condemnation law and utilizing in their stead "its new and radical theory," violated the Agreement between New Jersey and New York which authorized this condemnation proceeding, thereby presenting "an important question of federal law." (20 N. Y. 2d at 483)

We respectfully submit that Judge Burke was correct—that the New York Court of Appeals by *expressly* refusing to apply long and well-settled principles of just compensation law operative in New Jersey when it valued the great bulk of the railroad which is physically located in New Jersey, breached the Agreement between the States. In Judge Burke's words,

> "'The Court in reaching today's decision pays lip service to the mandate it is under to determine the award for the New Jersey properties here in question under the requirements of the New Jersey and federal constitutions, but it is not an open question what the New Jersey and federal authorities hold. They expressly reject the notion that special or unique value to the taker alone, the basis upon which the majority's suggested award is founded, may be considered in determining just compensation." (20 N. Y. 2d at 481)

Judge Burke noted that the leading New Jersey decision on this point speaks "in terms so unambiguous that one would not think its view could be disregarded" by the majority in the Court of Appeals. (20 N. Y. 2d at 481)

We further submit that Judge Burke was also correct when he stated that under the provisions of the Agreement, New Jersey was entitled

> "to have applied even to determination of just compensation for the New York property here in question the law *as it existed* under settled principles heretofore followed in this State, not as it has just been so drastically changed. An interstate compact is analogous in many respects to a contract (See *Dyer* v. *Sims*, 341 U. S. 22, 28-29) and the bi-state legislation constituting this compact, providing that the owner of the property thus taken should 'not be awarded for such property any increment above the just compensation required by the constitutions of the United States and of the state or states in which the property is located or has its situs by reason of any circumstances whatsoever' (N. Y. Sess. Laws 1962, ch. 209, §14; N. J. Laws 1962, ch. 8 §14), may, especially since the requirements of all three constitutions were formerly regarded as virtually identical, reasonably be read as incorporating the well settled rules of law applicable to this case and as barring the sort of judicial amendment of our state's constitution indulged in here today. The State of New Jersey, which has appeared herein by its Attorney General as *amicus curiae*, and the Port Authority, it would seem, have rights under this compact which must take precedence over our judicial solicitude for those financial interests, whoever they may be and wherever they may be located, that have seized upon this railroad as an object for speculation." (20 N. Y. 2d at 483)

New Jersey is commencing this original action in order to protect its vital interest in having the Agreement to which

it is a party performed according to its terms. The duties which the State of New York has assumed by entering into the Agreement cannot be avoided by the classification as "*sui generis*" of a judicial action brought pursuant to and subject to the Agreement. It is this Court's duty to protect the State of New Jersey from such a disregard by the highest Court of New York of the terms of the Agreement into which New Jersey and New York voluntarily entered. Since this suit is clearly within this Court's original jurisdiction under Article III of the Constitution, as this brief will show, New Jersey cannot and should not in the performance of its constitutional duty rely for the protection of its rights upon PATH's forthcoming petition to this Court for a writ of *certiorari* asking it to review the action of the New York Court of Appeals under the Agreement.

We emphasize that it was on the basis of the provisions in the Agreement upon which New Jersey relies before this Court that it cooperated with New York in directing their joint agency to take over the operation of the Hudson Tubes railroad. New Jersey desired—and it so provided in its agreement with New York—that New Jersey condemnation law should be applied to that portion of the Hudson Tubes railroad located in New Jersey and that defendant HRT should not receive any "increment" for its property above that required, under the Constitutions of the United States, New Jersey and New York "by reason of any circumstances whatsoever." If it had known that the very antitheses of well-settled New Jersey principles of condemnation law would be applied in valuing the Hudson Tubes railroad and that, as a result, an unforeseeable windfall would be bestowed upon private parties at the public's expense, it would certainly have explored and might well have adopted other means for handling this portion of the commuter transit problem. Under the Court of Appeals opinion, the public must pay not only

(a) the $40 million it has already spent in rehabilitating the railroad in order to keep it operating safely[1] and (b) annual operating deficits of $5 to $10 million—sums which New Jersey knew had to be spent when it authorized the acquisition of this railroad—but on top of all this the public will be compelled to spend at least another $80 million and possibly much more to acquire this deficit-ridden enterprise.

In view of the well-settled nature of condemnation law on this point the Court of Appeals' opinion which in Judge Burko's words "create[d] new and revolutionary law" represents a flagrant breach of New York's Agreement with New Jersey. The Court adopted as its rule of decision in this case the exact *opposite* of what the United States Court of Appeals for the Second Circuit had declared in reference to this very railroad was the "only invariable principle of valuation in condemnation proceedings . . . the award should reflect what the owner has lost; the criterion is not what the taker has gained."[2] Indeed this Court has only recently restated the same thought when it said:

> "The guiding principle of just compensation is reimbursement to the owner for the property interest taken. 'He is entitled to be put in as good a position pecuniarily as if his property had not been taken. *He must be made whole but is not entitled to more.*'" [Citation omitted] (Emphasis added.) *United States* v. *Virginia Electric & Power Co.*, 365 U. S. 624, 633 (1961).

Unless New Jersey's rights under its Agreement are protected by this Court, it will be irreparably damaged in that

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[1] Port of New York Authority, Public Affairs Department, "Path Observes Fifth Anniversary", August, 1967.

[2] *Spitzer* v. *Stichman*, 278 F. 2d 402, 410 (1960).

the capacity of its agency, the Port Authority, will be substantially impaired in developing and improving other much needed terminal, transportation and other facilities of commerce necessary to the continued welfare of the State and its inhabitants.

Furthermore, other condemnation valuations will be taking place under the Agreement. One such valuation proceeding is scheduled to commence in the Spring of this year in the New York State Supreme Court. This valuation proceeding will involve property condemned by the Port Authority under the Agreement for World Trade Center purposes. Unless this Court acts, the New York courts in these proceedings will undoubtedly feel bound to follow the reasoning of their Court of Appeals' decision. Similarly, the Agreement authorizes the Port Authority to construct a large transportation complex in the City of Jersey City and the courts of New Jersey are entitled to this Court's guidance as to what the Agreement requires if condemnation proceedings are brought to effectuate this project.

The short of the matter is that New Jersey's rights under its Agreement with New York have been violated, and it has brought this suit in order to protect them.

ARGUMENT

The instant controversy is clearly within the original jurisdiction of this Court under Article III of the Constitution.

New Jersey has brought this suit against the defendant State of New York, and the defendant HRT, under Article III of the Federal Constitution. Section 2 of Article III provides that the judicial power of the United States

> "shall extend * * * to Controversies between two or more States"

as well as to those

> "between a State and Citizens of another State."

And Section 2 of Article III also states that

> "in all cases * * * in which a State shall be a Party, the supreme Court shall have original Jurisdiction."

Thus, this action by one State against a sister State and by a State against a citizen of another State clearly falls within this Court's original jurisdiction under the plain meaning of the Constitution's words.

Precisely in point is an earlier suit where this Court, in an original action brought by the Commonwealth of Pennsylvania against the State of New Jersey and certain individually named defendants, granted complainant's motion for leave to file its complaint. *Commonwealth of Pennsylvania* v. *State of New Jersey, et al.*, 309 U. S. 628 (1940). That case arose out of an erroneous decision by the highest court of the defendant State of New Jersey which had held that certain private individuals, citizens of New Jersey (*Colburn, et al.*), were entitled under an Agreement between Pennsylvania and New Jersey to receive from the Delaware River Joint Toll Bridge Commission, an agency of the two States, consequential damages to their property arising out of the construction by the Commission of a bridge between the two States.

The bi-State agency there in question petitioned this Court, just as PATH is about to do now, for a writ of *certiorari* to review the decision of the highest court of one of the compacting States which the agency contended had violated the express terms of the Agreement by requiring

it to pay wholly consequential damages on account of property adversely affected by bridge construction. Here PATH will petition this Court to review the New York Court of Appeals' decision contending that the decision is violative of the express terms of the Agreement between the States.

In *Pennsylvania* v. *New Jersey, et al.*, the Commonwealth of Pennsylvania sued to protect its substantial interest in the faithful performance of its Agreement with New Jersey. It joined as defendants, the State of New Jersey and the individuals who were the plaintiffs in the action in the New Jersey courts. The State of New Jersey, although a defendant in that suit, conceded that this Court had jurisdiction over the suit and joined in Pennsylvania's request that it definitively interpret the obligations of the two States under the Agreement between them. The individual defendants, the plaintiffs in the state court action, however, objected to the granting of the motion on the grounds that the Court lacked jurisdiction over the suit.[1] Despite the objections, this Court, nevertheless, granted Pennsylvania's motion to file its bill of complaint.[2]

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[1] The individual defendants contended that jurisdiction over the suit was lacking because (a) no justiciable controversy existed; (b) Pennsylvania had failed to join as a defendant the Toll Bridge Commission which was asserted to be a necessary party to the litigation and further that if the Commission had been joined as a party, as it should have been, this Court's original jurisdiction would be destroyed since such jurisdiction does not embrace a suit by a State against its own agencies or citizens; and (c) by entering into the Compact with New Jersey, Pennsylvania had divested itself in favor of its agency of any right to sue with regard to the subject matter of the agreement.

[2] As previously noted, the case was never decided on its merits —see 310 U. S. 612—since Pennsylvania's rights under the Compact were vindicated when this Court unanimously reversed the decision of the New Jersey courts in *Delaware River Toll Bridge Commission* v. *Colburn*, 310 U. S. 419 (1940).

The facts of the instant case are identical. Here New Jersey, like Pennsylvania almost 30 years ago, claims that a decision of the highest court of a State with which it has entered into an agreement has violated the Agreement by awarding a private party damages against one of its agencies, contrary to the Agreement's requirements. Here, as there, the complainant State has brought an action against the other State and the private party that was a litigant in the previous State court proceedings to enjoin the enforcement of the allegedly erroneous State court decision. A case closer in point cannot be conceived.

Even aside from the precedent of *Pennsylvania* v. *New Jersey, et al.*, it is evident that the instant case is within this Court's original jurisdiction. For example, in *Kentucky* v. *Indiana*, 281 U. S. 163 (1930) this Court, in the course of granting a decree specifically enforcing an interstate agreement, stated that it has the power and duty to consider *de novo* all questions relating to Congressionally-sanctioned interstate compacts and a decision by the courts of one of the compacting States is not binding upon the other State who is a party to the Compact. Mr. Chief Justice Hughes pointed out:

> "It cannot be gainsaid that in a controversy with respect to a contract between states, as to which the original jurisdiction of this court is invoked, this court has the power and duty to determine for itself all questions that pertain to the obligations of the contract alleged. The fact that the solution of these questions may involve the determination of the effect of the local legislation of either state, as well as of acts of Congress, which are said to authorize the contract, in no way affects the duty of this court to act as the final constitutional arbiter in deciding the questions properly presented. * * * Where the states

themselves are before this Court for the determinaiton of a controversy between them, neither can determine their rights inter sese, and this court must pass upon every question essential to such a determination, although local legislation and questions of state authorization may be involved. *Virginia* v. *West Virginia,* 11 Wall. 39, 56, 20 L. ed. 67, 71, 220 U. S. 1, 28." (281 U. S. at 176)

Similarly, in *West Virginia ex rel. Dyer* v. *Sims,* 341 U. S. 22, 28 (1951), this Court said:

"Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies * * * is the function and duty of the Supreme Court of the Nation."

It is, therefore, clear that, with regard to the obligations that New York and New Jersey assumed to each other in their Agreement, the State of New York is responsible to the State of New Jersey for the acts of its officers whether their action is caused by a judicial decision or otherwise. The fact that an interstate Agreement is violated by a judicial decision misinterpreting and misapply-

ing material provisions thereof rather than by legislative or executive action makes it no less a violation and, consequently, cannot detract from this Court's power and duty to insure that such Agreements are faithfully performed in accordance with their provisions.[1]

CONCLUSION

In view of the foregoing, the plaintiff, the State of New Jersey, submits that there is presented here a justiciable controversy between itself and the named defendants over which this Court has original jurisdiction.

Respectfully submitted,

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[1] That a judicial decision constitutes State action is well established by the landmark decision of *Shelley* v. *Kraemer,* 334 U. S. 1 (1948), which held that the enforcement by state courts of a racially restrictive agreement among private parties constituted State action within the meaning of the fourteenth amendment. During the course of its opinion, the court stated in unequivocal terms that it had "no doubt that there has been state action . . . in the full and complete sense of the phrase." (334 U. S. at 19)

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No. 1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Petitioner,

v.

HUDSON RAPID TUBES CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Jurisdiction

The decision of the New York Court of Appeals was rendered and the remittitur of the court issued on October 31, 1967 (A. 1-24, A. 151-53).* On motion of petitioner, the Court of Appeals recalled and amended the remittitur on December 7, 1967 (A. 154-55). The petition for a writ of certiorari was filed on January 26, 1968.

* This and similar references are to the consecutively paginated appendices (Appendix A through Appendix J) bound with the petition. References to the latter are abbreviated "Pet.", and the brief submitted by the State of New Jersey *amicus curiae* in support of the petition is cited "N.J. *Amicus* Br.". As in the petition, the printed transcript of the trial is cited by the abbreviation "Tr.".

Question Presented

Acting under the authority of bi-state legislation amending and supplementing an earlier compact, petitioner brought this proceeding in the Supreme Court of the State of New York to condemn respondent's property, an interstate rail rapid transit system, to continue its function as a vital commuter facility serving the northern New Jersey-New York metropolitan area. The New York Court of Appeals made its award in response to the requirements of "just compensation" embodied in the Constitutions of the States of New York and New Jersey and the United States Constitution. U. S. Const., amends. V, XIV; N. Y. Const., art. I, §7(a); N. J. Const., art. I, §20.

The question presented is whether a substantial federal question is raised as to the quantum of the award, on petitioner's argument "that any award for the condemnee's property in excess of scrap value would violate [a] Congressionally sanctioned bi-state legislative compact and would therefore be contrary to Article I, §10, Clause 3 of the Constitution of the United States" (A. 155) in that any such award would violate two provisions of the bi-state legislation:

> (i) that the owner of the property shall not be awarded any "increment" above constitutionally mandated "just compensation;" and
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> (ii) that in a single action brought to condemn property located in both States, the court of the forum State shall apply the law of valuation of the other State with respect to the part of the condemned property located in that State.

Statement of the Proceedings

The property taken in this proceeding by Port Authority Trans-Hudson Corporation ("PATH"), a wholly owned subsidiary of The Port of New York Authority ("Port Authority"), is a subaqueous and subterranean rail rapid transit system providing trans-Hudson passenger transportation between northern New Jersey and New York City. The railroad was taken in its entirety as an operating entity to continue the same essential public utility service that it has rendered continuously for more than half a century.

Although financially unprofitable due to a reduction in traffic and revenue caused by the Port Authority's manifold creation of tax-exempt competitive vehicular bridge and tunnel facilities, the railroad has remained, as declared in the bi-state legislation directing its taking, "an essential railroad facility serving the northern New Jersey-New York metropolitan area." N. Y. Sess. Laws 1962, ch. 209, §1(3), N. Y. Unconsol. Laws §6601(3) (McKinney Supp. 1967); N. J. Laws 1962, ch. 8, §1(3), N. J. Rev. Stat. §32:1-35.50(3) (Supp. 1962-1963).*

* Petitioner's striving to suggest that at the time of condemnation the railroad was on the brink of "imminent cessation" of operations (Pet. 11; see Pet. 17) was duly recognized by the trial court's observation that any notion of the railroad's abandonment was "an impermissible dream" (A. 69). In approving the plan of reorganization under which the railroad assets were transferred to respondent shortly before condemnation, the District Court squarely rejected the argument that transferring the railroad assets to a new corporation was "tantamount to abandonment of the railroad," and stated that respondent would be "in a sound position to meet its obligations and will have adequate working capital to conduct its working operations." *Re Hudson & Manhattan R.R.*, 174 F. Supp. 148, 170, 171 (S.D.N.Y. 1959), *aff'd sub nom. Spitzer* v. *Stichman*, 278 F. 2d 402 (2d Cir. 1960). Although not earning net income after depreciation, the railroad had a cash operating throwoff (Tr. 3550-53).

The Hudson Tubes' indispensability in the annual transportation of 30,000,000 passengers, including one-fourth of all trans-Hudson commuters to New York City by all modes of travel during the critical morning peak hour, and one-half of all such commuters entering Manhattan south of the Lincoln Tunnel (A. 67-68), was duly emphasized by the New York Court of Appeals (A. 2), and has been repeatedly acknowledged by the Port Authority itself in statements *ante litem motam* that if the railroad were unavailable to carry so substantial a segment of the commuting public, "trans-Hudson vehicular facilities would be incapable of handling the passenger load" (Tr. 4720-21, 4723).

After a lengthy trial, in which it heard evidence as to the railroad's operations, the condition of its facilities, equipment and finances, and the cost of its creation and reproduction, the trial court (Supreme Court, New York County) made findings, neither reversed nor modified on appeal, that the railroad operated "regularly and satisfactorily" in "safe and sound condition at speed and spacing between trains equal to the performance of New York City subways" (A. 69, A. 112), that the "uncontroverted" reproduction cost less depreciation of the railroad was at least $447,600,000, and that the original cost of the facilities *in use* on the date of condemnation (September 1, 1962) was approximately $62,000,000 (A. 99, A. 108-109).

The trial court awarded $55,000,000 as just compensation (A. 127), of which $30,000,000 was attributed to the eight-mile complex of subaqueous and subterranean tunnels, "the most vital and important component of an operating trans-Hudson commuter rail system" (A. 126), which were found to be "sound and safe and have a utility as such into the distant and indefinite future" (A. 125).

On appeal, a sharply divided Appellate Division reduced the award for the entire railroad from $55,000,000 to $3,500,000. Two of the five justices accepted the simple

syllogism upon which petitioner has rested its entire case since the proceeding commenced nearly six years ago, that because "the railroad was incapable of profitable operations" as a private enterprise, "only scrap or salvage value should be allowed for its structures," despite the enormous investment in its facilities and despite the fact that those facilities were being taken for continued use (A. 41). One justice "concur[red] in the result but only with great reluctance" in an opinion which showed how unjust the result was (A. 47-49). Two justices vigorously dissented, one voting to affirm and the other to increase the award (A. 52-61).

The New York Court of Appeals reversed the Appellate Division and reinstated the trial court award of $30,000,000 for the subway and tunnel properties, reasoning that such an award "predicated on the conclusion that the condemnees should at least be repaid for the depreciated original cost of the tunnels is fair and just and that an award considerably above or below that figure would be 'manifestly unjust' to the owner whose property is taken and the people who must pay the bill" (A. 9). The question of the quantum of just compensation for the non-tunnel property and for going concern value, which is not now before this Court, was remanded to the trial court for further consideration.

Petitioner's single contention throughout this proceeding—a contention it now seeks to carry to this Court—is that the sole consideration and determinative fact in arriving at "just compensation" for the condemned property was the railroad's unprofitability of operations, which, in petitioner's submission, dictated an award of only the amount which the broken-up pieces of the railroad would have brought as scrap, upon the theory that such an amount, derived from a fictional liquidation of the railroad and sale of its parts as junk, represented the value of the

railroad to the condemnee and its loss by reason of the taking. Any larger payment, it is contended, would represent an interdicted "value to the taker." With complete consistency and absolute devotion to this premise, the value petitioner attached to the tunnels and subways, "the most vital and important component" of the railroad system, was *minus* $100,000, because on a liquidation of the railroad the pieces of the tunnels could not be broken up and carted away and it would cost $100,000 to plug up the tunnels (A. 4n).

It was in addressing itself to this argument that the Court of Appeals asked:

> "Can it be said by any objective standard that an award of scrap value—*nothing*—is fair and just for the tunnel property, an essential part of an essential public facility, which cost some $32,000,000 to construct, which would cost in excess of $400,000,000 to reproduce and which, with some minor expenditures, will function as good as new for an indefinite period?"

and answered:

> "We think not" (A. 8) (emphasis in the original).

The assigned ground for now bringing the argument to this Court is that any award for the railroad of more than scrap value would be an "increment" above "just compensation" and a departure from the valuation law of New Jersey, and hence would be a two-fold violation of the bi-state legislation and accordingly of the Compact Clause of the United States Constitution.*

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* The specific provisions of the bi-state legislation upon which petitioner rests its entire argument are the portions of Section 14 which provide that "[i]n any such action or proceeding the court or courts of the forum state shall apply the laws of valuation of the other state (hereinafter sometimes called the nonforum state) to the valuation of the property which is located or has its situs in the nonforum state . . ." and that "[t]he owner of any property acquired by condemnation or the exercise of the right of eminent domain for any of the purposes

Reasons for Denying Certiorari

None of the reasons assigned by petitioner for granting the writ has validity. Indeed, all are spurious and ill conceal the strategem of simply seeking a review of the quantum of an award in a state court condemnation proceeding on a plaint by the condemnor that the award was excessive.

The reasons for denying the petition are many:

(1) The petition rests entirely upon the contention that the determination of "just compensation" in this case is a matter of statutory construction—a contention that is the frankest recognition that petitioner has no claim on this Court's jurisdiction under the Constitutions of New York or New Jersey or under any provision of the United States Constitution. But equally clearly, the New York court's determination of just compensation is not turned into a process of statutory construction, giving rise to a federal question, merely because the statute incorporates—what it could not alter or avoid—the constitutional requirement of "just compensation;" provides—as would also be assumed—that no "increment" above "just compensation" shall be awarded; and further provides that the determination of that compensation shall be made in accordance with the law of two States rather than one.

(2) The New York Court of Appeals did no more than perform its constitutional duty of determining "just compensation" in accordance with the "dominant consideration" enunciated by this Court in *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 123 (1950):

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of this act shall not be awarded for such property any increment above the just compensation required by the constitutions of the United States and of the state or states in which the property is located or has its situs by reason of any circumstances whatsoever." N. Y. Sess. Laws 1962 ch. 209, §14, N. Y. Unconsol. Laws §6614 (McKinney Supp. 1967); N. Y. Laws 1962, ch. 8, § 14, N. J. Rev. Stat. §32:1-35.63 (Supp. 1962-1963).

"What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill" (A. 8). It did not consider awarding respondent any "increment" above "just compensation." The statutory provision against awarding an "increment" above just compensation, whatever its prompting and possible application, is not a talisman for coming to this Court for a review of the quantum of the award on an argument that the amount determined to be just compensation was excessive and thus an "increment" above just compensation in violation of the legislation. Nor is there any inflexible rule for the determination of "just compensation" or any rule that makes scrap value the measure of just compensation for the taking of a commercially unprofitable but essential public utility to continue its indispensable public service, so that any larger award would be excessive as a matter of law and reviewable by this Court as a violation of the statute.

(3) The New York Court of Appeals, far from disregarding the statutory provision respecting the application of New Jersey law, particularly heeded the mandate and, although unable to "state with certainty what approach our brethren on the New Jersey Supreme Court would take to this problem," decided the case as best it could in accordance with the view the New Jersey court would presumably adopt to avoid "the manifest injustice of awarding scrap value" (A. 11). The most that can be contended on the point, therefore, is that the New York court erred in its discernment of New Jersey law, which would be no ground for resort to this Court, *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93, 96 (1917); *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491, 496 (1903), nor a tenable basis for argument that New York has committed a breach of compact. Needless to say, the fact that the court of one State had the problem and duty

of determining and applying the law of another State does not cast this Court as the only authoritative exponent of that law.

(4) Petitioner's contention on the merits is so patently lacking in substance that it does not warrant this Court's consideration, even if the Court should otherwise be disposed to take the case. Petitioner's whole argument that the single fact of the railroad's unprofitability left no room for other considerations or for the exercise of any judicial judgment, but called automatically for taking scrap value as the amount of the award, is in the Court of Appeals' words "neither compelled nor warranted by precedent," but is "manifestly unjust" (A. 5, 9). Indeed, the argument is utterly inadmissible, for as this Court said in *Denver* v. *Denver Union Water Company,* 246 U. S. 178, 191 (1918): "It involves a practical contradiction of terms to say that property useful and actually used in a public service is not to be estimated as having the value of property in use, but is to be reckoned with on the basis of its 'junk value'."

(5) The case presents no "special and important reasons" for the exercise of this Court's discretionary certiorari jurisdiction. Rule 19(1). Its sole feature of any distinctiveness, that it involves property located in two States, would make a decision of little precedential value. The precedent would only establish a pattern for bringing to this Court, for determination of the quantum of an award, any condemnation proceeding brought by the Port Authority or for that matter any other compact agency. Petitioner's claim that the proceeding concerns a matter of "current national importance" (Pet. 31) is based on a single far-fetched reference to another case which involves entirely different legal issues and is not analogous at all.

I.

No question of construction of a compact was or is presented.

Petitioner's posing and phrasing the question here as one of statutory construction does not conceal the fact that the only question in the case, and the question petitioner seeks to bring to this Court for further consideration and final determination, is what amount is "just compensation" for the condemned property. Petitioner concedes as much when it states as the "critical question" in the case: "What are the parameters of the constitutional requirement of just compensation?" (Pet. 21)

That question cannot be given the guise of a question of statutory construction to bring the case within the ambit of the authority petitioner invokes as the support for its claim on this Court's jurisdiction. Indeed, it is the height of pretense to suggest that a question that cannot reach this Court as a constitutional question may be slipped in as a question of statutory construction because the constitutional requirement, which is independently controlling, is also incorporated in the statute by reference with no different effect.

In short, the statute, in so far as it specifies that "just compensation" shall be the determinant of the award, adds nothing to, and certainly can subtract nothing from, the constitutional requirement and composition of "just compensation." It is not claimed or suggested that in principle or result there could be any difference in the determination of "just compensation" depending on whether the statutory reference to "just compensation" is in or out of the statute. The whole of petitioner's argument as to what would constitute "just compensation," what is allowable and what is not, is drawn from constitutional cases. No case is cited or can be imagined where "just compensation" is a matter of statutory construction. The petition is nothing more

than an attempt to make a state statute a vehicle to impose on this Court an issue which in its nature and substance is not reviewable by this Court.*

The cases cited and relied on by petitioner can only be contrasted to the instant case.

Delaware River Joint Toll Bridge Commission v. *Colburn,* 310 U. S. 419 (1940), turned squarely upon interpretation of a compact, not upon the application of an independently operative constitutional principle to which the compact merely makes reference.** Thus, the certiorari principle enunciated in the *Colburn* case, that "the construction of such a compact . . . involves a federal 'title, right, privilege or immunity' which . . . may be reviewed here on certiorari" (310 U. S. at 427), cannot be stretched to confer jurisdiction in this case.

And equally clearly, there is no issue here presented as to the validity of the bi-state legislation or the underlying compact, as was presented in *Dyer* v. *Sims,* 341 U. S. 22

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* Certainly this Court will not determine whether an award by the courts of New York constitutes just compensation under the New York Constitution, *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 566 (1898), or under the New Jersey Constitution, *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co., supra* at 96 (1917). And while a taking of private property for public use without just compensation is "wanting in the due process of law secured by the Fourteenth Amendment," *Chicago, Burlington and Quincy R.R.* v. *Chicago,* 166 U. S. 226, 241 (1897), it has never been held or intimated by this Court that the Fourteenth Amendment may be invoked by a condemning state agency as a basis for protesting as excessive a condemnation award made by state courts. Indeed, petitioner makes no such claim, resting its entire argument as to both jurisdiction and the merits on the provisions of the 1962 "compact."

** In *Colburn,* this Court "address[ed itself] to the language of the compact" in resolving the underlying question of "whether the Compact of 1934 between New Jersey and Pennsylvania authorizing the construction of the bridge and its approaches excluded the application to petitioner of a New Jersey statute without which respondents would enjoy no right of recovery under New Jersey law." (310 U. S. at 428 and 425).

(1951) (see p. 21n, *infra*), upon which petitioner mistakenly relies.

In sum, there is not a semblance of a point that can be made that this case in any way involves a construction of, or a determination of rights or obligations under, a compact.*

II.

No question of awarding an "increment" above just compensation was or is presented.

Like the words "just compensation" in the statute, the word "increment" does not and could not qualify the constitutional requirement, the judicial function in determining the amount of the award, or the determination that should be made. *See United States* v. *New River Collieries,* 262 U. S. 341, 343-44 (1923); *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312, 327 (1893); *Baltimore & Ohio R.R.* v. *United States,* 298 U. S. 349, 368 (1936).

Patently the whole argument structured on the word "increment" in the statute is no more than a contention that the award was excessive, and the word "increment," like the words "just compensation," is seized upon as a makeweight in an attempt to make the quantum of the award reviewable by this Court.

If in some unimaginable way claimant had argued in the state courts that for some reason it was entitled to something above "just compensation" and the New York courts had agreed, petitioner's argument might rise to the tenuous. But there was never any question in this case

* When and how the argument was improvised is indicative of its substance. Petitioner did not as much as intimate that there might be such an issue as a construction or violation of the bi-state legislation at any time during the trial or in its briefs prior to the rendition of the trial court's decision. Only after the decision came down did petitioner, in excepting to the tentative decree, have the thought of throwing in an argument based on the Compact Clause. Even in the Court of Appeals, petitioner thought so little of the idea as to give it less than two pages in its 119-page brief, and the court with a proper sense of proportion did not refer to the suggestion in its opinion. The court, at petitioner's request, amended its remittitur to record that the court had "passed upon" and rejected petitioner's argument (A. 155).

except the amount that would constitute "just compensation;" neither side spoke except as to what would constitute "just compensation;" and the Court of Appeals undertook no more than its duty in determining the amount that would be "just compensation."

That the Court of Appeals was doing no more than its duty in response to fundamental principles of fairness and justice in determining just compensation, and was not awarding or considering awarding any "increment" above just compensation, is manifest from the reasoning and result of the court's decision. It recognized that there was no inflexible rule that could be applied to reach a magic number, and that it could not be the automation that petitioner claimed it should be and award no compensation at all, literally nothing for the entire tunnel complex that constituted the most vital part of the railroad system, and call that "just compensation." Like the trial court, which said that in its probing "to arrive at an award which is fair, just and equitable, all that can be expected is the attainment of substantial justice" (A. 132), the Court of Appeals spoke with a balance and decisiveness that is all that can be expected in a condemnation proceeding, when it said that "an award either considerably above or below that figure [$30,000,000 for the tunnels and subways] would be 'manifestly unjust' to the owner whose property is taken and the people who must pay the bill" (A. 9).

III.

There is no basis for the contention that the New York Court of Appeals "refused" to apply New Jersey law and thereby "violated" the statute.

There is no greater merit in petitioner's contention that the Court of Appeals "refused" to apply New Jersey law to the valuation of the portion of the railroad located in that State, and thereby "disregarded" and "violated" the bi-state legislation's provision for the application of New Jersey law (Pet. 25-28).

The Court of Appeals specifically noted and heeded the statutory mandate, citing and considering New Jersey cases (A. 11). The court naturally could not "state with certainty" what award the New Jersey Supreme Court would have made—no more could this Court—but said and did all that could be said and done under the circumstances: "We must, however, decide the case and we believe that because of the manifest injustice of awarding scrap value, it is not unreasonable to assume that the view we have taken would be adopted by that court" (*ibid.*).*

Petitioner could have divided the condemnation jurisdiction between the two States, but chose to avail itself of the statute's provision for bringing a "single action" in one State, with the concomitants that the highest court of that State had to render the final determination of any tendered question of the law of the non-forum State, and that, as provided in the statute, petitioner and claimant were "bound by the judgments" so rendered. N. Y. Sess. Laws 1962, ch. 209, §14, N. Y. Unconsol. Laws §6614 (McKinney Supp. 1967); N. J. Laws 1962, ch. 8, §14, N. J. Rev. Stat. §32:1-35.63 (Supp. 1962-1963).

The inability of the New York court to divine with certainty the judgment that would have been rendered in the sister State is no basis or reason for turning to this Court for the determination. There is no more of an opening into this Court or ground for seeking its intervention

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* New Jersey's suggestion that a "casual perusal" of the opinion "makes it crystal clear that the Court did not even endeavor to make a good faith attempt to perform these compact provisions" (N. J. *Amicus* Br. 12) is not just unfounded; it exceeds the bounds of responsible advocacy.

through the assertion that the quantum of the award represented a violation of the statute with respect to the application of New Jersey law than there is through the assertion that the quantum represented a violation as an "increment" above just compensation. Both contentions are groundless in the argument they come down to, that the statutory wording was understood to mean, what it could not constitutionally mean, that compensation was being legislatively fixed at "scrap" value, or less than nothing for the entire system of tunnels and subways.

At best the argument fails under *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co., supra,* where Mr. Justice Holmes disposed of a like contention with the statement: "There is nothing to suggest that it [the Missouri Supreme Court] was not candidly construing the Colorado statutes to the best of its ability, and even if it were wrong, something more than an error of construction is necessary in order to entitle a party to come here under Article IV, §1." (243 U. S. at 96); see also *Johnson* v. *New York Life Ins. Co., supra* at 496.

Even if this Court were to pass judgment on the Court of Appeals' interpretation of New Jersey law, that interpretation could not be found to be erroneous. The courts of New Jersey have never had occasion to determine just compensation for utility property condemned to be continued in operation. They have, however, recognized that in applying the constitutional mandate of just compensation in individual cases, "at best we can only attain a measure of flexibility in the variety of circumstances that may arise," *State* v. *Burnett,* 24 N. J. 280, 288, 131 A. 2d 765, 769 (1957), and have further recognized that condemnation of "the entire plant of a public service corporation . . . with the purpose of continuing its operation as a governmental enterprise" presents "a specialized situation," in which "the plant is to be valued as a going

concern." *City of Trenton* v. *Lenzner*, 16 N. J. 465, 477, 109 A. 2d 409, 415 (1954), *cert. denied*, 348 U. S. 972 (1955).

At no time in the proceedings below did petitioner suggest that New Jersey law differs in its application to this case from New York law, and it ill behooves petitioner to chide the trial court for having failed to "mention a single New Jersey decision" (Pet. 14), when petitioner itself did not discuss or cite in its voluminous post-trial briefs any of the New Jersey cases upon which it now relies. Petitioner's first citation of New Jersey cases and argument based on New Jersey law came only after the trial court's decision, with the after-thought that the statute might be assigned the burden of carrying petitioner's argument that "scrap value" was "just compensation" as a matter of law.*

IV.

There is no merit in petitioner's contention that scrap value is "just compensation" as a matter of law.

While the office of this brief is to deal with jurisdictional questions rather than with the merits of the determination of "just compensation" made, some brief reference to the latter is justified by the fact that the petition is mainly devoted to the merits—which itself demonstrates that petitioner is seeking a review of the quantum of the award, rather than raising any question of "construction" of a compact.

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* It was not until after the trial court had rendered a decision that petitioner, objecting to the tentative decree, unearthed the case of *Currie* v. *Waverly & N.Y.B.R.R.*, 52 N.J.L. 381, 20 Atl. 56 (N. J. Ct. Err. & App. 1890), which it now holds out as "the leading New Jersey authority on the question . . ." (Pet. 27). The *Currie* decision involved vacant, unimproved land condemned for use as a railroad right-of-way, not an existing operating railroad taken to be continued in operation.

We beg to say just three things on the merits, which are dispositive of the underlying contention that scrap value was "just compensation" as a matter of law, according to which the only relevant evidence or allowable considerations in determining "just compensation" would be the income statement of the railroad and expert testimony of a junk dealer.*

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* Petitioner's highly edited "Statement" (Pet. 5-18), and its preoccupation with a reorganization which was consummated before condemnation, rather than with the evidence in this proceeding, manage to avoid the salient facts and give an altogether false impression. Its references to the bi-state legislation omit the basic legislative findings that underlie the case—that "rail services are and will remain of extreme importance" in providing commuter transportation that is essential to the economic preservation of the northern New Jersey-New York metropolitan area and that the Hudson Tubes "is an essential railroad facility." N. Y. Sess. Laws 1962, ch. 209, §1(3), N. Y. Unconsol. Laws §6601(3) (McKinney Supp. 1967); N. J. Laws 1962, ch. 8, §1(3), N. J. Rev. Stat. §32:1-35.50(3) (Supp. 1962-1963). Petitioner's studied derogation of the railroad flies in the face of the undisputed facts, found by the trial court, that the railroad when condemned was "operating satisfactorily in safe and sound condition at speed and spacing between trains equal to the performance of New York City subways" and that the tunnels, "the most vital and important component of an operating trans-Hudson commuter rail system," have "a utility as such into the distant and indefinite future" (A. 69, A. 125-26). As the Court of Appeals noted, an expenditure of only $88,000 was required to put the entire eight-mile complex of tunnels and subways in "perfect working order" (A. 4). The trial court aptly observed with respect to petitioner's whole position that it betrays "a blindness which refuses to credit the reality of this railroad system as one integrated, vital and in use" (A. 130).

Even petitioner's references to the concluded reorganization proceedings, with their emphasis upon the "engineers' value" given therein (Pet. 9), fail to state the one fact of any significance, if relevance at all can be found in those proceedings, namely, that the engineers expressed the opinion—on the basis of a rough and short-cut estimate of reproduction cost which was less than half of what that cost turned out to be when detailed engineering studies were actually made—that a reasonable price to be paid for the railroad by a public authority on a negotiated purchase would be between $25,000,000 and $35,000,000 (PATH Exh. 203 id., p. 64).

Finally, it is surprising that petitioner should address to this Court the *ad hominem* argument that "just compensation" for the property taken is "unjust enrichment of speculator interests" (Pet. 24). This interjection purports to find support in the opinion of Justice Steuer

First, the petition's citation of numerous decisions claimed to set forth "the principles of just compensation as they had been established" (Pet. 19) cannot obscure the fact that no court has ever held that scrap value would be just compensation for an operating utility condemned for continuation in the same use, whether or not profitable. To the contrary, the proposition has been rejected wherever and whenever it has been advanced. *Matter of City of New York (Fifth Avenue Coach Lines)*, 23 App. Div. 2d 463 (First Dep't 1965), *modified on other grounds*, 18 N. Y. 2d 212 (1966) *appeal dismissed*, 386 U. S. 778 (1967); *Re City of Oroville*, P.U.R. 1922E 451 (Cal. R.R. Comm'n); *Re City of Eureka*, 19 Cal. R.R. Comm'n Dec. 952 (Cal. R.R. Comm'n 1921); *International Ry.* v. *Niagara Parks Comm'n* [1937] 3 D.L.R. 305 (Privy Council); *Re City of Peterborough and Peterborough Electric Light and Power Co.*, 52 Ont. L. Rep. 9 (App. Div. 1916); see *Denver* v. *Denver Union Water Co.*, quoted at p. 9, *supra*.

Second, the cases upon which petitioner relies (Pet. 19-23) as proscribing any consideration of "gain to the condemnor" are beside the point, for they refer to "*a value which the government itself created* and hence in fairness should not be required to pay," *United States* v. *Cors*, 337 U. S. 325, 334 (1949) (emphasis added), and are in "sharp contrast," as the Court of Appeals put it, to the case presented by the Hudson Tubes of "property which has *a usefulness created by the owner himself* through the expenditure of large sums of money and by the continued

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in the Appellate Division, which was demonstrably mistaken in its statement that the beneficiaries of the award will not be "the people whose investment built the road," but various classes of creditors who became stockholders (A. 52). On consummation of the plan of reorganization, the entire equity ownership of the railroad was vested in the bondholders, who were the very people "whose investment built the road" and carried it to the day the States elected to take it over to continue its historic essential service.

operation of the property for the very purpose for which the petitioner is acquiring the property" (A. 5-6) (emphasis added). Here, rather than some "enhanced" value due to the taking, it was the *inherent* value of the property, which would not be recognized by the "manifest injustice" of an award of scrap value, that the trial court and Court of Appeals necessarily considered.

Third, the award made and confirmed by the Court of Appeals was in no sense based "on the value of the railroad to the public" (Pet. 2). That value, just for the tunnels and subways which are the only property before this Court, would certainly be related to reproduction cost, which the Court of Appeals noted as being "in excess of $400,000,000" (A. 4). The award of an amount less than original cost of the tunnel and subway property actually in use, particularly considering that the tunnels "with some minor expenditures, will function as good as new for an indefinite period" (A. 8), and less than one-tenth of reproduction cost less depreciation, was no assessment of "value to the taker," but a conscientious judicial response to the mandate of determining "[w]hat compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?" *United States* v. *Commodities Trading Corp., supra* at 123; see also *United States* v. *Virginia Electric & Power Co.*, 365 U. S. 624, 631 (1961); *Matter of City of New York* (*Fifth Avenue Coach Lines*), *supra.**

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* Petitioner dissembles when it attempts to create an appearance that the Court of Appeals "refused to follow" what it "recognized to be the law" and "traditional rule"—"that just compensation requires only that the condemnee be paid for what he has lost and not for what the taker has gained"—and instead held that "the owner must be paid not for his economic loss, but for the public gain resulting from the taking" (Pet. 5, 16-17). The Court of Appeals did nothing of the kind. Rather, what it referred to as the "traditional rule" that has "normally been accepted as a just standard" is to award "market value," *i.e.*, "the sum of money which [the owner] could have

V.

The case presents no special and important reasons for granting certiorari.

This case presents no "special and important reasons" for the exercise of this Court's discretionary certiorari jurisdiction. Rule 19(1). The only aspect of the case that makes it at all distinctive—the fact that it involves property located in two States condemned in a single proceeding under the authority of identical bi-state legislation—raises no federal question, as has been shown in Points I, II and III. No precedential value can be perceived in any decision this Court might render, and it is the grossest of exaggerations to suggest, as the petition and New Jersey's *amicus* brief warn, that "the integrity and future viability of interstate compacts are at stake" (Pet. 18; N. J. *Amicus* Br. 4). The case does not involve an interpretation, much less the integrity or validity, of even this

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realized in an uncoerced sale in the open market to a willing buyer" (A. 5-6), and what it said, quoting this Court, was that no "rigid rule" exists or can be dogmatically applied, and "when the market value has been too difficult to find, or when its application would result in manifest injustice to the owner or public, courts have fashioned and applied other standards" (A. 6). And, again quoting this Court as to the guiding principle and objective, the Court of Appeals sought exactly what it should have sought, a result that was " 'just' both to an owner whose property is taken and to the public that must pay the bill" (A. 8). The court then put petitioner's position to the test: "Can it be said by any objective standard that an award of scrap value—*nothing*—is fair and just for the tunnel property, an essential part of an essential public facility, which cost some $32,000,000 to construct, which would cost in excess of $400,000,000 to reproduce and which, with some minor expenditures, will function as good as new for an indefinite period?" "We think not," the court answered (*ibid.*) (emphasis in the original). Finally, far from taking the "public gain" or "value to the taker" as the amount of the award, as petitioner without any warrant states the court did, the court accepted the trial court's conclusion, with respect to the tunnels, that it would be "fair and just" that "the condemnees should at least be repaid for the depreciated original cost of the tunnels" (A. 9). Anything less would have been, as the court said, "manifestly unjust."

one legislative amendment to the 1921 Compact, and it cannot seriously be thought to have any implications for the law of interstate compacts generally.*

The present case does not assume "current national importance" (Pet. 31) because it involves the public acquisition of a railroad. Petitioner has not pointed to any pending or contemplated proceedings to condemn commuter rail facilities which might be affected by the Court of Appeals' decision. Resolution of the challenge recently made to the Interstate Commerce Commission's decision approving terms for the inclusion of the New Haven Railroad in the Penn-Central system, on which alone the petition relies as demonstrating the supposed national importance of this litigation (Pet. 31), is not likely to be influenced by the decision in this case, for the ICC's determination turned upon the specific statutory criteria of Section 5(2) of the Interstate Commerce Act, 49 U.S.C. §5(2) (1964), and Section 77(e) of the Bankruptcy Act, 11 U.S.C. §205(e) (1964), rather than the constitutional yardstick of just compensation in eminent domain.**

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* Compare *Dyer* v. *Sims, supra,* reviewing and reversing a decision of the Supreme Court of Appeals of West Virginia which had held the latter State's participation in the Ohio River Valley Sanitation Compact to be unconstitutional, largely upon the ground that it involved an impermissible delegation by the Legislature of the state police power. *Dyer* v. *Sims,* 134 W.Va. 278, 294-98, 58 S.E. 2d 766, 775-77 (1950). New Jersey's *amicus* brief lists ten compacts to which the State is a party, a fact which may be of academic interest but holds no significance whatever for this case, fo. none of the compacts contains language even remotely comparable to the provisions upon which petitioner relies here.

** Not once in its lengthy opinion approving terms for the New Haven's inclusion did the ICC cite the Court of Appeals decision in this proceeding. *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.,* I.C.C. Finance Docket No. 21989 (Nov. 16, 1967). That the decision has been cited in a complaint challenging the ICC's action (*The Chase Manhattan Bank* v. *United States and Interstate Commerce Commission,* 68 Civ. 306 [S.D.N.Y., complaint filed Jan. 23, 1968]) is not of moment, particularly when the citation

And New Jersey's ever so far-fetched conjuring of "a problem of federal law" in the threat it sees in the Court of Appeals' decision to the Urban Mass Transportation Act of 1964, 49 U.S.C. §§1601-11 (1964), is revealing only of the amazing view the State seems to entertain that the Act cannot be effectuated if, as the statute requires, "just and adequate compensation" is paid for property taken (N. J. *Amicus* Br. 4-5, 14-15).

Finally, the case does not achieve significance because New Jersey is attempting in an original action, *New Jersey* v. *New York and Hudson Rapid Tubes Corporation*, No. 34, Original (October Term; 1967, motion for leave to file complaint filed Jan. 22, 1968), to raise the same issues and make the same arguments as the petition and New Jersey's *amicus* brief advance. A nonexistent issue does not materialize, nor does an insubstantial issue become substantial, because it is uttered by two voices rather than one or because one of the voices is that of a State.

Respondent is simultaneously herewith filing a brief in opposition in the original action, setting forth the many reasons why that action is not in order and why the Court should decline to exercise its original jurisdiction. The significance to be found in the extraordinary attempt to invoke this Court's original jurisdiction is its tacit admission of the insubstantiality of the petition for a writ of certiorari.

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relates only to the issue of going concern value (Pet. 32-33), which has been remanded by the Court of Appeals and is not involved in the pending petition. Even if this case held any significance for the New Haven proceeding and if that significance were misconceived by the three-judge District Court which has been empanelled, the matter could be righted by this Court on direct appeal. 28 U.S.C. §1253 (1964).

CONCLUSION

The petition for a writ of certiorari to the Court of Appeals of the State of New York should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1054

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Petitioner,

v.

HUDSON RAPID TUBES CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The brief submitted by Hudson Rapid Tubes (HRT) opposing the certiorari petition of Port Authority Trans-Hudson (PATH) reduces itself to this: Although the compact clause of the Constitution expressly authorizes the States, with the consent of Congress, to solve regional problems by means of interstate Compacts, the ultimate and sole responsibility for the construction, application, enforcement and validity of such agreements lies with the State courts and not with this Court. Fortunately for the future utilization of interstate Compacts, *Delaware River Joint Toll Bridge Commission* v. *Colburn,* 310 U. S. 419, and *Dyer* v. *Sims,* 341 U. S. 22, are clear holdings to the contrary.

1. In Point I of its brief, HRT argues that this case, unlike *Colburn,* presents no question of Compact interpretation and, consequently, this Court has no jurisdiction.

However, Point III of its brief itself proves the insubstantiality of HRT's argument in Point I since it contends that PATH's interpretation (not to mention Judge Burke's[1]) renders the Compact provisions here involved unconstitutional, *i.e.*, the legislatures of New York and New Jersey could not validly require the judiciary to apply the constitutional standards in effect in 1962 and the then existing judicial interpretation of the principle of just compensation which, under the circumstances of this case, mandate an award of liquidation value ($3.5 million).

Thus HRT argues on the one hand that there are no Compact provisions to construe and on the other that if the Compact provisions are construed in accordance with what Judge Burke and PATH maintain are their meaning, they are unconstitutional.

This latter contention not only admits the existence of a substantial Compact construction question within the meaning of *Colburn* but it also requires this Court to hold that just as the "Supreme Court of the Nation" had the power and duty to ascertain for itself the validity and enforceability of the Compact provisions involved in *Sims*, it has the power and duty to ascertain for itself the validity and enforceability of the Compact provisions involved here.

2. HRT compounds its error when it relies upon conflict of laws cases[2] based on the Constitution's full faith

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[1] Judge Burke, in his dissenting opinion in the Court of Appeals, construed the terms of the interstate Compact here involved as giving PATH a right "to have applied . . . the law *as it existed* under settled principles heretofore followed in this State, not as it has just been drastically changed" (A-23, Emphasis, Judge Burke's) and that the Compact should "be read as . . . barring the sort of judicial amendment of our State's Constitution indulged in here today." (A-23)

[2] *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93, cited in HRT's brief at pp. 8, 11 and 15 and *Johnson* v. *New York Life Insurance Co.*, 187 U. S. 491, cited in HRT's brief at pp. 8 and 15.

and credit clause to answer PATH's contention that this Court has the power, under the compact clause, to correct what we assert is the New York Court of Appeals' misinterpretation of New Jersey law in valuing the 65% of the railroad property located in New Jersey.

HRT's reliance on conflict of laws cases points up the fact that it has no answer to our claim that the compact clause provides a sound jurisdictional foundation for this Court to make an independent determination here of what constitutes New Jersey condemnation law. HRT ignores the holdings of the decisions of this Court mandating the conclusion that in compact clause cases an error in the application of State decisional law in enforcing or construing a Compact's terms gives this Court jurisdiction.

The decision in *Colburn* clearly established this Court's power to review by certiorari questions of Compact construction even when it meant holding that the New Jersey courts had misapplied Pennsylvania law and therefore misconstrued the Compact. Contrary to HRT's argument here that this Court cannot reexamine the New York Court's interpretation of New Jersey law, this Court in *Colburn* itself, because of the Compact, carefully reviewed and interpreted the Pennsylvania law.

And in *Sims* this Court, relying upon *Colburn* for its jurisdiction, held that it could review a State court's construction of State law in the course of enforcing the terms of an interstate Compact. Writing for this Court, Mr. Justice Frankfurter there said that it is the function and duty of the Supreme Court "to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States" (341 U. S. at 28) and "that the fact the compact questions reach us on a writ of certiorari rather than by way of an original action brought by a State does not affect the power of this Court." (*Id.* at 30)

WHEREFORE, PATH's petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 22, 1968

PROOF OF SERVICE

I, JOSEPH LESSER, a member of the Bar of the Supreme Court of the United States, and an attorney in the office of SIDNEY GOLDSTEIN, attorney for the Petitioner, hereby certify that on the 22nd day of March, 1968, I served three copies of the foregoing brief on the Respondent Hudson Rapid Tubes Corporation by mailing said copies in a duly addressed envelope with first class postage pre-paid to:

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/s/ JOSEPH LESSER

Joseph Lesser